

EXHIBIT “A”

Exhibit "A" to Plaintiff's Motion to Compel Production of Defendant's Hard Drives

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

STRIKE 3 HOLDINGS, LLC, a Delaware corporation,

Plaintiff,

vs.

JOHN DOE subscriber assigned IP address 73.225.38.130,

Defendant.

Case No.: 2:17-cv-01731-TSZ

**[PROPOSED] ESI PROTOCOL FOR
PRODUCTION OF DEFENDANT'S
COMPUTER HARD DRIVES**

1. Plaintiff, Strike 3 Holdings, LLC ("Plaintiff"), has requested that Defendant produce for inspection all of Defendant's computer device hard drives¹ in his possession, custody, or control which were at his residence during the time of infringement. Defendant will produce forensically sound images of the following hard drives ("Hard Drives") to Plaintiff for inspection subject to the entry of this stipulated protective order.

a. Seagate Model Number ST3750528AS; serial number 9VP05TWX; and

¹ For the avoidance of doubt, "Hard Drives" means any computer device, including any computer laptop or desktop, mobile phone, external hard drive, portable hard drive, server, NAS (Network-Attached Storage), USB (thumb) drive, internal hard drives which may have been removed from their original device, solid state hard drives, contents of a cloud based storage account, or any other electronic device capable of connecting to the internet, downloading media files, or storing electronic data, used by, or within Defendant's possession, custody or control at his Residence during the period of infringement.

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1 b. Asus Model Number CG5270-BP003; Serial Number PF1G95B15000014 or
2 95PDAG039530.

3 2. In conducting an examination of Defendant's Hard Drives, Plaintiff may only
4 search for evidence of: (1) Plaintiff's copyrighted Works identified on Plaintiff's Amended
5 Complaint in this case; (2) BitTorrent and Peer-to-Peer file sharing; and (3) sophisticated
6 wiping efforts, spoliation, and the suppression of evidence. The foregoing parameters are
7 explained in detail in Paragraph 7 of this Protective Order.

8 3. Plaintiff, Defendant, and their respective counsel are automatically bound by this
9 Protective Order. Prior to receiving any of Defendant's Hard Drives, or forensically-sound
10 images of same, each qualified person defined in sections (a) - (d) below shall be provided with
11 a copy of this Order and shall execute and be bound by this Order by signing the agreement
12 attached hereto as Exhibit A, an original of which shall be maintained by Plaintiff's counsel. As
13 soon as signed, the signed copy will be provided to Defendant's counsel. "Qualified persons"
14 are defined as:

- 15 a. experts or consultants (together with their clerical staff) retained by such counsel
16 to assist in the prosecution, defense, or settlement of this action;
17 b. employees of attorney services or professional copy services retained by a
18 counsel of one of the parties;
19 c. court reporter(s) employed in this action; and
20 d. any other person as to whom the parties in writing agree.

21 4. Plaintiff will engage the services of a local computer professional ("Computer
22 Professional") to create a forensically sound images of Defendant's Hard Drives. Plaintiff will
23 be solely responsible for the cost and fee associated with retention of this Computer
24 Professional.

25 5. The Computer Professional will produce a forensically sound image of each
26 Hard Drive using industry-standard software and procedures. After completion of the imaging,
27

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1 the Computer Professional will send the Defendant's hard drive images to Plaintiff's computer
2 forensic expert.

3 6. Prior to receiving any of Defendant's Hard Drives, Plaintiff's computer forensic
4 expert shall be provided with a copy of this Order and shall execute and be bound by this Order
5 by signing the agreement attached hereto as Exhibit A.

6 7. Plaintiff's forensic expert is permitted to search the imaged hard drives for
7 evidence of: (1) Plaintiff's Copyrighted Works identified on Plaintiff's Amended Complaint in
8 this case; (2) BitTorrent clients and Peer-to-Peer file sharing software; and (3) wiping efforts,
9 spoliation, and the suppression of evidence. Plaintiff's forensic expert is only permitted to
10 search Defendant's imaged Hard Drives for these three categories, as specified in paragraphs (a)
11 – (c) below.

12 a. Plaintiff's Works: Plaintiff's computer forensic expert is permitted to search for:
13 (1) the title, and any variation thereof, of Plaintiff's Works identified on
14 Plaintiff's Amended Complaint in this case; (2) the term "Tushy;" (3) the term
15 "Blacked;" (4) the term "Vixen;" and (3) the term "Blacked Raw."

16 b. BitTorrent or Peer-to-Peer File Sharing Use: Plaintiff's forensic expert is
17 permitted to search for: (1) the term "torrent"; and (2) the presence or prior
18 existence of a BitTorrent Client or Peer-to-Peer file sharing software (i.e., torrent
19 clients, torrent trackers, torrent bookmarks, torrent files, torrent file fragments,
20 torrent related web history, and evidence of other peer-to-peer software).

21 c. Spoliation and Suppression of Evidence: Plaintiff's forensic expert is permitted
22 to search for evidence of: (1) wiping efforts such as the reformatting or wiping of
23 a Hard Drive; (2) deletions; (3) significant alterations; and (4) the suppression of
24 evidence. This involves the examination of or search for: (1) information about
25 how and when the image was created; (2) the timeline of Hard Drive usage; (3)
26 the operating system installation information; (4) devices that have been plugged
27

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1 into the Hard Drive; (5) anti-computer forensic software (software specifically
2 designed to wipe or delete user activity on a Hard Drive) including by not limited
3 to Evidence Eliminator, BC Wipe, Window Washer, and other wiping software
4 programs installed on the Hard Drive; and (6) the contents within the unallocated
5 space and recycling bin of the Hard Drive; and modifications on the Hard Drive
6 registry.

7 8. If the above listed parameters yield relevant results, Plaintiff's forensic expert
8 will reproduce the information or data to Plaintiff.

9 9. If Plaintiff's forensic expert's examination reveals relevant information matching
10 the above search criteria, provided the information is not information listed in paragraphs 10 or
11 11 of this Protective Order, he shall be allowed to disclose the relevant information, the stored
12 location of the information, and/or the allocation format of the data to Plaintiff. Plaintiff will
13 then provide its expert report consistent with Fed. R. Civ. P. 26(a)(2) by this Court's deadline.
14 Determination as to the form, foundation, and admissibility of the location and/or allocation
15 format of the information will be made by the Court prior to trial.

16 10. Plaintiff's forensic expert shall not disclose to Plaintiff's counsel any relevant
17 information which includes Defendant's IRS filings, banking information, and personal
18 information regarding Defendant's family members. If Plaintiff's forensic expert discovers
19 relevant information which include this sensitive information therein, Plaintiff's forensic expert
20 will, without disclosing the contents, notify both Plaintiff's counsel and defense counsel of this
21 discovery. Defendant will determine whether Defendant wishes to prevent disclosure of any
22 such confidential information. Plaintiff reserves the right to move the Court for an *in camera*.

23 11. Plaintiff's forensic expert shall not disclose to Plaintiff's counsel any relevant
24 privileged information. If Plaintiff's forensic expert discovers relevant privileged information,
25 Plaintiff's forensic expert will, without disclosing the contents, notify both Plaintiff's counsel
26 and defense counsel of this discovery. Defendant will determine whether Defendant wishes to
27

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1 assert a claim of privilege to the information. Plaintiff reserves the right to move the Court for
2 an *in camera*. Neither Plaintiff's forensic expert nor any other person's review of privileged
3 information, nor any inadvertent disclosure thereof, will constitute a waiver of any privilege by
4 Defendant.

5 12. Plaintiff's forensic expert initial analysis shall be limited as set forth in this
6 Order, plus an analysis of the location of files discovered. No further analysis shall be
7 performed without the agreement of the parties or Court Order.

8 13. The search of all Defendant's imaged hard drives shall be limited to the manner
9 described above and there shall be no modification or deviation of the methods of data
10 extraction without prior written agreement of the parties or order of the Court.

11
12 IT IS SO ORDERED

13 Date:

14
15 _____
16 UNITED STATES DISTRICT JUDGE
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Exhibit "A" to Plaintiff's Motion to Compel Production of Defendant's Hard Drives

EXHIBIT A TO PROTECTIVE ORDER FOR PRODUCTION
OF DEFENDANT'S COMPUTER HARD DRIVES

I, _____, located at _____,
have read the foregoing Stipulated Protective Order and agree to be bound by the terms thereof,
and I further stipulate and agree that the United States District Court for the Western District of
Washington shall have personal jurisdiction over me for purposes of enforcing the terms of the
Stipulated Protective Order.

By: _____

Printed: _____

Date: _____

EXHIBIT “B”

THE HONORABLE THOMAS S. ZILLY

U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

STRIKE 3 HOLDINGS, LLC, a Delaware
corporation,

Plaintiff,

vs.

JOHN DOE, subscriber assigned IP address
73.225.38.130,

Defendant.

NO. 2:17-cv-01731-TSZ

**DEFENDANT'S RESPONSES AND
OBJECTIONS TO PLAINTIFF'S
FIRST REQUESTS FOR
PRODUCTION**

JOHN DOE subscriber assigned IP
address 73.225.38.130,

Counterclaimant,

vs.

STRIKE 3 HOLDINGS, LLC,

Counterdefendant.

REQUEST FOR PRODUCTION NO. 1:

A forensically sound copy (*i.e.*, a clone) of the hard drive for each of the COMPUTER
DEVICES USED in YOUR house, apartment or dwelling from August 12, 2016 to present day.

OBJECTION:

Defendant objects to this request as unduly burdensome and improper, to the extent
Plaintiff asks Defendant to "clone" any computer devices. Defendant is not required to "clone"

1 or do anything to the computers in his possession and control. Defendant further objects that
2 this request seeks documents and ESI protected by the attorney-client privilege, including
3 communications to and from counsel.

4 **RESPONSE:**

5 Without waiving any objections, Defendant responds: Subject to entry of an agreement
6 to protect private and sensitive information in a form identical or substantially similar to the
7 model ESI protocol in this district, Defendant will produce computing devices for inspection.

8
9 **REQUEST FOR PRODUCTION NO. 2:**

10 All DOCUMENTS that constitute, mention, or otherwise RELATE to the Internet
11 browser activity on each of YOUR COMPUTER DEVICES from August 12, 2016 to present
12 day.

13 **OBJECTION:**

14 Defendant objects to this request as irrelevant, overbroad and intrusive, to the extent that
15 it seeks information regarding browser activities unrelated to this litigation. Defendant further
16 objects that this request seeks information that is protected by the attorney-client privilege.
17 Moreover, the request is overly broad as to time in that it relates to dates before the first date of
18 infringement. Finally, the request is unduly burdensome as it requests the inspection of over 70
19 devices.

20 **RESPONSE:**

21 Without waiving any objections, Defendant responds: Subject to entry of an agreement
22 to protect private and sensitive information in a form identical or substantially similar to the
23 model ESI protocol in this district, Defendant will produce computing devices for inspection.

1 **REQUEST FOR PRODUCTION NO. 3:**

2 All DOCUMENTS that constitute, mention, or otherwise RELATE to the purchase of a
3 COMPUTER DEVICE USED in YOUR house, apartment, or dwelling from August 12, 2016 to
4 present day.

5 **OBJECTION:**

6 Defendant objects to this request as overly broad as to time in that it relates to dates
7 before the first date of infringement. Defendant further objects that this request is unduly
8 burdensome as it requests the inspection of over 70 devices, many of which were purchased
9 used at such places as ebay and goodwill, and for which Defendant has not retained records.

10 **RESPONSE:**

11 Subject to and without waiving these objections, Defendant will produce relevant
12 documents in his possession, custody, or control.

13
14 **REQUEST FOR PRODUCTION NO. 4:**

15 All DOCUMENTS that constitute, mention, or otherwise RELATE to the purchase of
16 any electronic equipment used to operate a COMPUTER DEVICE in YOUR house, apartment,
17 or dwelling from August 12, 2016 to present day.

18 **OBJECTION:**

19 *See* Objection to Request for Production No. 3.

20 **RESPONSE:**

21 *See* Response to Request for Production No. 3.
22

23 **REQUEST FOR PRODUCTION NO. 5:**

24 All DOCUMENTS that constitute, mention, or otherwise RELATE to the setup, use, and
25 control of any modem and wireless router which was USED in YOUR house, apartment, or
26 dwelling during the PERIOD OF RECORDED INFRINGEMENT.

1 **OBJECTION:**

2 No objection.

3 **RESPONSE:**

4 Defendant will produce documents in his possession, custody, or control.

5
6 **REQUEST FOR PRODUCTION NO. 6:**

7 All DOCUMENTS that constitute, mention, or otherwise RELATE to records of any
8 computer programs downloaded, uploaded, or installed on any COMPUTER DEVICE USED in
9 YOUR house, apartment or dwelling from August 12, 2016 to present day.

10 **OBJECTION:**

11 *See* Objection to Request for Production No. 2

12 **RESPONSE:**

13 *See* Response to Request for Production No. 2.

14
15 **REQUEST FOR PRODUCTION NO. 7:**

16 All DOCUMENTS and COMMUNICATIONS between YOU and YOUR ISP that
17 constitute, mention, or otherwise RELATE to contracts, agreements, usage statements, bills,
18 payments, Digital Millennium Copyright Act notices, and any notice regarding copyright
19 infringement.

20 **OBJECTION:**

21 Defendant objects to this request as irrelevant and overbroad, to the extent it seeks
22 information that would intrude on activities unrelated to this litigation. Defendant further
23 objects that the time period is overly broad in that it relates to dates before the first date of
24 infringement.

25 **RESPONSE:**

26 Subject to and without waiving any objections, Defendant will produce documents in his
possession, custody, and control.

REQUEST FOR PRODUCTION NO. 8:

All DOCUMENTS, including credit card statements, receipts, or other statements that RELATE to the purchase and installation of anti-virus software between August 12, 2016 to present day for use on a COMPUTER DEVICE in YOUR house, apartment or dwelling.

OBJECTION:

Defendant objects to this request as irrelevant and overbroad, to the extent it seeks information that would intrude on activities unrelated to this litigation. Defendant further objects that the time period is overly broad in that it relates to dates before the first date of infringement. Further, the purchase of anti-virus software is irrelevant to a claim of infringement.

RESPONSE:

Subject to and without waiving any objections, Defendant will produce documents in his possession, custody, or control.

REQUEST FOR PRODUCTION NO. 9:

All FILES, DOCUMENTS, and COMMUNICATIONS transmitted by YOU through PEER-TO-PEER SOFTWARE, which includes the BITTORRENT network, that constitutes, mentions, or otherwise RELATES to PLAINTIFF'S copyrighted WORKS or portions of those WORKS.

OBJECTION:

Defendant objects to this request as irrelevant, overbroad and intrusive, to the extent that it seeks information unrelated to this litigation. Defendant further objects that the request is overly broad as to time in that it relates to dates before the first date of infringement. Further, the request is unduly burdensome as requires keeping a log of all files transferred whether or not they are related to copyrighted works. Further the request requests irrelevant documents untethered to this litigation.

1 **RESPONSE:**

2 Without waiving any objections, Defendant responds: Subject to entry of an agreement
3 to protect private and sensitive information in a form identical or substantially similar to the
4 model ESI protocol in this district, Defendant will produce computing devices for inspection.

5
6 **REQUEST FOR PRODUCTION NO. 10:**

7 All DOCUMENTS that RELATE to the purchase and/or installation of any PEER-TO-
8 PEER SOFTWARE on any COMPUTER DEVICE USED in YOUR house, apartment, or
9 dwelling from August 12, 2016 to present day.

10 **OBJECTION:**

11 Defendant objects to this request as irrelevant, overbroad and intrusive, to the extent that
12 it seeks information regarding computer activities unrelated to this litigation. Defendant further
13 objects that the request is overly broad as to time in that it relates to dates before the first date of
14 infringement.

15 **RESPONSE:**

16 Subject to and without waiving any objections, Defendant will produce documents in his
17 possession, custody, or control.

18
19 **REQUEST FOR PRODUCTION NO. 11:**

20 A complete copy of all of the FILES contained within any CLOUD BASED STORAGE
21 SYSTEM to which YOU or anyone in YOUR house, apartment or dwelling, have used between
22 the first date of recorded infringement (*i.e.*, from August 12, 2016) through present day,
23 including but not limited to all DOCUMENTS that RELATE to any such CLOUD BASED
24 STORAGE SYSTEM, including the contract, and all statements of account and usage.

25 **OBJECTION:**

26 Defendant objects to this request as irrelevant, overbroad and intrusive, to the extent that
it seeks information regarding computer activities unrelated to this litigation. Defendant further

1 objects that the request is overly broad as to time in that it relates to dates before the first date of
2 infringement.

3 **RESPONSE:**

4 Subject to and without waiving any objections: Defendant has no documents to produce.
5

6 **REQUEST FOR PRODUCTION NO. 12:**

7 A complete copy of any FILES stored on any video game consoles which were used in
8 YOUR house, apartment or dwelling from August 12, 2016 to present day.

9 **OBJECTION:**

10 *See* Objection to Request for Production No. 1.

11 **RESPONSE:**

12 *See* Response to Request for Production No. 1.
13

14 **REQUEST FOR PRODUCTION NO. 13:**

15 Any DOCUMENTS that constitute, mention, or otherwise RELATE to any legal notice
16 of tenants or residents authorized to live at YOUR house, apartment, or dwelling at any time
17 during the PERIOD OF RECORDED INFRINGEMENT, including but not limited to any
18 existing lease, rental agreements, and/or sublet agreements.

19 **OBJECTION:**

20 Defendant objects to the term “legal notice” as vague and ambiguous. Further, the
21 request is irrelevant to the Plaintiff’s prior cause of action or defenses to Defendant’s
22 counterclaims.

23 **RESPONSE:**

24 Subject to and without waiving these objections, Defendant will produce any and all
25 agreements in his possession, custody, or control.
26

1 **REQUEST FOR PRODUCTION NO. 14:**

2 All COMMUNICATIONS between YOU and a third party that mentions or RELATES
3 to PLAINTIFF or any of PLAINTIFF’S Copyrighted Works, including but not limited to
4 emails, instant messages, social network postings, chat room comments, and any and all other
5 forms of electronic communication.

6 **OBJECTION:**

7 Defendant objects to this request as overly broad in that “RELATES” to “PLAINTIFF’S
8 Copyrighted Works” could be construed to include to encompass the entire pornography
9 industry. Defendant further objects to this request to the extent that it seeks communications
10 that are protected by the attorney-client privilege.

11 **RESPONSE:**

12 Subject to these objections, and to the entry of an agreement to protect private and
13 sensitive information in a form identical or substantially similar to the model ESI protocol in
14 this district, Defendant will produce any and all agreements in his possession, custody, or
15 control.

16
17 **REQUEST FOR PRODUCTION NO. 15:**

18 Any and all DOCUMENTS and COMMUNICATIONS which indicate that YOU were
19 not at the residence assigned to subscriber IP address 73.225.38.130 or within the CONTROL
20 of IP address 73.225.38.130 during the PERIOD OF RECORDED INFRINGEMENT.

21 **OBJECTION:**

22 Defendant objects to this request as overbroad and harassing, as it seeks to intrude on
23 personal activities unrelated to this litigation, and encompasses deeply private documents,
24 including but not limited to medical records. Defendant further objects that this request is for
25 information that is protected by the attorney-client privilege. Defendant further objects that this
26 request is irrelevant as Plaintiff has no pending infringement claims against Defendant.

RESPONSE:

Subject to and without waiving any objections: Defendant has no such documents currently in his possession, custody, or control.

REQUEST FOR PRODUCTION NO. 16:

Any and all DOCUMENTS and COMMUNICATIONS that support, evidence, or otherwise RELATE to YOUR CONTENTION that YOU are not the individual who infringed PLAINTIFF'S copyrighted WORKS as alleged in PLAINTIFF'S initial Complaint.

OBJECTION:

Defendant objects to this request, which seeks documents in order to prove a negative, and regarding issues for which Defendant does not bear the burden of proof.

RESPONSE:

See Response to Request for Production No. 2.

REQUEST FOR PRODUCTION NO. 17:

Any and all DOCUMENTS and COMMUNICATIONS that indicate or demonstrate that another individual infringed PLAINTIFF'S copyrighted WORKS as alleged in PLAINTIFF'S initial Complaint.

OBJECTION:

See Objection to Request for Production No. 16.

RESPONSE:

See Response to Request for Production No. 16.

REQUEST FOR PRODUCTION NO. 18:

Any and all DOCUMENTS and COMMUNICATIONS from YOUR Internet Service Provider, Comcast Cable Communications, LLC, which notified YOU of PLAINTIFF'S initial Complaint against YOU.

OBJECTION:

Defendant objects to this request as irrelevant as Plaintiff has no pending infringement claims against Defendant. Defendant further objects that the information requested is equally available to Plaintiff through Comcast.

RESPONSE:

Subject to and without waiving these objections, Defendant will produce all non-privileged responsive documents in his possession, custody, or control.

REQUEST FOR PRODUCTION NO. 19:

Any and all DOCUMENTS which evidence that PLAINTIFF has an ulterior motive in the use of any legal process in this case.

OBJECTION:

Defendant objects that substantial discovery remains to be conducted, and that this request seeks documents that are already in Plaintiff's possession, custody, or control, or otherwise more readily available to Plaintiff than to Defendant.

RESPONSE:

Subject to and without waiving any objections: *See* Dkt. Nos. 4, 4-1, 4-2, 4-3, 4-4; *see also* documents in Plaintiff's possession related to Plaintiff's attempt to depose Defendant's son.

REQUEST FOR PRODUCTION NO. 20:

Any and all DOCUMENTS which evidence that the use of any legal process in this case by PLAINTIFF was not proper in the regular prosecution of such process.

1 **OBJECTION:**

2 *See* Objection to Request for Production No. 19.

3 **RESPONSE:**

4 *See* Response to Request for Production No. 19.

5
6 **REQUEST FOR PRODUCTION NO. 21:**

7 A copy of any current government issued photo identification for YOU.

8 **OBJECTION:**

9 Defendant objects to this request as irrelevant to any claims or defenses.

10 **RESPONSE:**

11 Defendant declines to produce documents in response to this request.

12
13 **REQUEST FOR PRODUCTION NO. 22:**

14 Any and all DOCUMENTS which evidence the “actual damages,” (as listed in
15 paragraph 54 of YOUR First Amended Counterclaims, Dk. 32) YOU have suffered.

16 **OBJECTION:**

17 Defendant objects that discovery is ongoing and Defendant’s damages are not complete.

18 **RESPONSE:**

19 Defendant has incurred substantial attorneys’ fees and will continue to incur attorneys’
20 fees due to Plaintiff’s actions. Defendant has also suffered from insomnia.

21
22 **REQUEST FOR PRODUCTION NO. 23:**

23 Any and all DOCUMENTS which evidence the “actual damages,” (as listed in
24 paragraph 57 of YOUR First Amended Counterclaim, Dk. 32) YOU have suffered.

25 **OBJECTION:**

26 Defendant objects to this request, which seeks documents containing private, medical
information, and documents protected by the attorney-client privilege.

RESPONSE:

Subject to these objections, and to the entry of an agreement to protect private and sensitive information in a form identical or substantially similar to the model ESI protocol in this district, Defendant will produce redacted responsive non-privileged documents in his possession, custody, or control.

REQUEST FOR PRODUCTION NO. 24:

Any and all DOCUMENTS which evidences that PLAINTIFF had “no intention of litigating” the instant case.

OBJECTION:

Defendant objects that substantial discovery remains to be conducted, and that this request seeks documents that are already in Plaintiff’s possession, custody, or control, or otherwise more readily available to Plaintiff than to Defendant.

RESPONSE:

Subject to and without waiving any objections: *See* Dkt. No. 53, Plaintiff’s Notice of Voluntary Dismissal without Prejudice.

REQUEST FOR PRODUCTION NO. 25:

Any and all DOCUMENTS which evidences that PLAINTIFF failed to “disclose the actual parties in interest” in this case.

OBJECTION:

Defendant objects that substantial discovery remains to be conducted, and that this request seeks documents that are already in Plaintiff’s possession, custody, or control, or otherwise more readily available to Plaintiff than to Defendant.

RESPONSE:

Subject to and without waiving any objections: Discovery is ongoing. Defendant will supplement this response if and when necessary.

REQUEST FOR PRODUCTION NO. 26:

Any and all DOCUMENTS which evidence the “actual damages,” (as listed in paragraph 66 of YOUR First Amended Counterclaim, Dk. 32) YOU have suffered.

OBJECTION:

See Objection to Request for Production No. 23.

RESPONSE:

See Response to Request for Production No. 23.

REQUEST FOR PRODUCTION NO. 27:

Any and all DOCUMENTS which evidence the “actual damages,” (as listed in paragraph 69 of YOUR First Amended Counterclaim, Dk. 32) YOU have suffered.

OBJECTION:

See Objection to Request for Production No. 23.

RESPONSE:

See Response to Request for Production No. 23.

REQUEST FOR PRODUCTION NO. 28:

Any and all “demand letters threatening exaggerated and unsupportable damages” (as listed in paragraphs 70-72 of YOUR First Amended Counterclaim, Dk. 32) which PLAINTIFF sent to YOU.

OBJECTION:

Defendant objects that substantial discovery remains to be conducted, and that this request seeks documents that are already in Plaintiff’s possession, custody, or control, or otherwise more readily available to Plaintiff than to Defendant.

RESPONSE:

Subject to and without waiving any objections: Defendant will produce any responsive non-privileged documents in this possession, custody, or control.

REQUEST FOR PRODUCTION NO. 29:

Any and all documents evidencing that YOU posted comments regarding BitTorrent or torrents generally on any online board, website, or forum.

OBJECTION:

Defendant objects that substantial discovery remains to be conducted, and that this request seeks documents that are already in Plaintiff's possession, custody, or control, or otherwise more readily available to Plaintiff than to Defendant.

RESPONSE:

Subject to and without waiving any objections: Defendant will produce any responsive non-privileged documents in this possession, custody, or control.

As to Answers Only:

By: /s/ John Doe
Defendant

As to Objections Only:

Respectfully submitted on March 18, 2019

By: /s/ J. Curtis Edmondson
J. Curtis Edmondson, WSBA #43795
3699 NE John Olsen Avenue
Hillsboro, Oregon 97124
Telephone: (503) 336-3749
Email: jcedmondson@edmolaw.com

Attorney for Defendant

CERTIFICATION OF ATTORNEY

I am one of the attorneys for Defendant [REDACTED] in this matter. I hereby certify that I have read the foregoing Defendant's Answers and Objections to Plaintiff's First Set of Requests for Production, and believe that the same are in compliance with Federal Rule of Civil Procedure 26(g).

DATED this 18th day of March, 2019.

By: /s/ J. Curtis Edmondson
J. Curtis Edmondson, WSBA #43795
3699 NE John Olsen Avenue
Hillsboro, Oregon 97124
Telephone: (503) 336-3749
Email: jcedmondson@edmolaw.com
Attorney for Defendant

CERTIFICATE OF SERVICE

I, J. Curtis Edmondson, hereby certify that on March 18, 2019, I electronically transmitted the foregoing to the following:

Bryan J. Case, WSBA #41781
Email: bcase@foxrothschild.com
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Telephone: (310) 598-4150

Attorneys for Plaintiff Strike 3 Holdings LLC

DATED this 18th day of March, 2019.

By: /s/ J. Curtis Edmondson
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Attorney for Defendant

EXHIBIT “C”

Exhibit "C" to Plaintiff's Motion to Compel Production of Defendant's
Hard Drives

THE HONORABLE THOMAS S. ZILLY

U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

STRIKE 3 HOLDINGS, LLC, a Delaware
corporation,

Plaintiff,

vs.

JOHN DOE, subscriber assigned IP
address 73.225.38.130,

Defendant.

JOHN DOE subscriber assigned IP
address 73.225.38.130,

Counterclaimant,

vs.

STRIKE 3 HOLDINGS, LLC,

Counterdefendant.

NO. 2:17-cv-01731-TSZ

**[PROPOSED] DEFENDANT'S
ESI PROTECTIVE ORDER ON
COMPUTERS AND HARD DRIVES**

The parties hereby stipulate to the following provisions regarding the discovery of
electronically stored information ("ESI") for the Defendant in this matter:

1 **A. General Principles**

2 1. An attorney's zealous representation of a client is not compromised by conducting
3 discovery in a cooperative manner. The failure of counsel or the parties to litigation to
4 cooperate in facilitating and reasonably limiting discovery requests and responses raises
5 litigation costs and contributes to the risk of sanctions.

6 2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied
7 in each case when formulating a discovery plan. To further the application of the
8 proportionality standard in discovery, requests for production of ESI and related responses
9 should be reasonably targeted, clear, and as specific as possible.

10 **B. ESI Disclosures**

11 Within 30 days after the Rule 26(f) conference, or at a later time if agreed to by the
12 parties, each party shall disclose:

13 1. Custodians. The five custodians most likely to have discoverable ESI in their possession,
14 custody or control. The custodians shall be identified by name, title, connection to the instant
15 litigation, and the type of the information under his/her control.

16 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g. shared
17 drives, servers, etc.), if any, likely to contain discoverable ESI.

18 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to
19 contain discoverable ESI (e.g. third-party email and/or mobile device providers, "cloud"
20 storage, etc.) and, for each such source, the extent to which a party is (or is not) able to
21 preserve information stored in the third-party data source.

22 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI
23 (by type, date, custodian, electronic system or other criteria sufficient to specifically
24 identify the data source) that a party asserts is not reasonably accessible under Fed. R.
25 Civ. P. 26(b)(2)(B). *[Section (C)(3)(a)(i) below sets forth data sources and ESI*
26 *27*

1 *which are not required to be preserved by the parties. Those data sources and ESI do*
 2 *not need to be included on this list.]*

3 DEFENDANT’S DESIGNATION PURSUANT TO SECTION B.

4 Plaintiff made a document request for all computers and electronic media in possession
 5 and control of Defendant.

6 1. Defendant John Doe is a retired cop who in his retirement purchased computers
 7 and fixed them up with the idea of providing them to non-profits as a hobby. Defendant John
 8 Doe has collected all electronic media and computers requested by the Plaintiff during the
 9 period of infringement and has turned them over to counsel for inspection. The number of
 10 computers and hard drives are approximately 100 and are in various states of operation.
 11 Defendant John Doe is the sole custodian. Defendant counsel is in possession of the hard drives
 12 and other media.

13 2. Defendant does not believe there is any non-custodial data sources.

14 3. Third Party data sources – This may include email servers for two email
 15 accounts. Defendant has searched those email accounts for requested documents.

16 4. Inaccessible Data – Some of the computers and hard drives may have failed or
 17 were purchased in a failed condition.

18
 19 **C. Preservation of ESI**

20 The parties acknowledge that they have a common law obligation to take reasonable
 21 and proportional steps to preserve discoverable information in the party’s possession, custody
 22 or control. With respect to preservation of ESI, Defendant has:

23 1. Gathered all computers and hard drives in possession during the period of infringement.
 24 As noted, this is approximately 100 items.

25 2. Identified the majority of the computers by model and S/N, and the same with
 26 the hard drives.

1 3. These categories of Defendant's ESI need not be preserved:

- 2 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 3 b. Random access memory (RAM), temporary files, or other ephemeral
- 4 data that are difficult to preserve without disabling the operating system.
- 5 c. On-line access data such as temporary internet files, history, cache,
- 6 cookies, and the like.
- 7 d. Data in metadata fields that are frequently updated automatically, such as
- 8 last-opened dates (see also Section (E)(5)).
- 9 e. Back-up data that are substantially duplicative of data that are more
- 10 accessible elsewhere.
- 11 f. f. Server, system or network logs.
- 12 g. Data remaining from systems no longer in use that is unintelligible on
- 13 the systems in use.
- 14 h. The computers and hard drives located at Counsel's office in Hillsboro,
- 15 Oregon, stored in numerous plastic containers.

16

17 DEFENDANT'S DESIGNATION PURSUANT TO SECTION C

18 4. Defendant has collected all requested computers and media and has stored them

19 at counsel's office.

20 5. Defendant will keep the computers and media in native format as the cost for a

21 complete forensic image of each drive and a string search of each drive is disproportionately

22 large (est \$ 50,000.00).

23

24

25 **D. Privilege**

26 1. With respect to privileged or work-product information generated after the filing of the

27

complaint, parties are not required to include any such information in privilege logs.

2. Subject to STEP “E”, Defendant will identify those computers that may have been used to communicate with this attorneys. Steps will be taken to identify those communications that are privileged.

E. ESI Discovery Procedures

Plaintiff contends that their IPP software has recorded “File Hashes” that uniquely identify an infringed movie that are approximately 20-40 minutes in length.

Plaintiff has provided, in response to Defendant’s discovery requests, data that their German monitoring system that is used to purportedly identify infringers. This data provided by the Plaintiff’s monitoring software is:

Work	Hash	Site
1	1BC8C1ADCAA75C3EC9408C8CCBF5147863205E6C	Tushy
2	0326E8923C58852725F5A7857833A4CD3E715289	Tushy
3	039F4779148D3E374D990283A83AC46A0219DAE9	Vixen
4	0CAB7415EAE003A2C3835DE5FC716759A49040B9	Tushy
5	0CDEB18021838E8E2A694A7D16D9A45366CFABB6	Blacked
6	1278F4C4BF0B45678418F6CC8F8844DE4AB68C83	Tushy
7	1487A26EAAAD70318258AB9F506506A8F293533A	Blacked
8	18A6F7D0E24D4FA3CC1589DE496D1AD9433CF09B	Blacked
9	1A032CB38BB2AF87DAF2B239A1A17B6C713EBC26	Blacked
10	1C2C06D480942F4FE7FDCED4759E93805E02B54B	Tushy
11	1D1B18BB0C921D6E1A6D148E4542257B42A2469F	Tushy
12	1D63168E762F9CB41AE4DBD6646599AD0EFF3911	Blacked
13	1D7E521CD7368013A7F1B28494A2AC43D8F99F0E	Vixen
14	1D7E721AC3B8D955BBCAD8D62F57AF030BD1F315	Vixen
15	22883186DAB5FCA92C8513AD939652BCB867FD5C	Tushy
16	22C377CC65B1695E6470BFAF967C4C825391EF90	Blacked
17	24D6E127081B069994E81CA544B8FF3E3A0A33D3	Tushy
18	258961E123E520633A96CDF11E8E6F60E233C816	Vixen
19	289FE7D65DFCFACB416832D12862105A2762841A	Blacked
20	31577E16E1B68BF13F30BE538E1BAF66E224726A	Tushy

1	21	322F6ABAB019761A6FF3C1211AF75B28137F013F	Vixen
	22	34452073A3328CE2AF5FC73A5A8DDD4141E85B4A	Vixen
2	23	374A3B65D604113BB3880FDACE83FD1EFED3CA7C	Tushy
	24	3945FEF635D609C3FB77DD4762FC2570E7E12D7C	Blacked
3	25	3F3D4931127C380DD0AA05C298E26438267560BB	Vixen
4	26	408577469D1675504E89F205C619738007D08DD9	Blacked
	27	4125860EC76C1E0880F652DA94EB84D375A64436	Tushy
5	28	464AB452DA8258FA23BA74830F0D57EE7CA518C5	Tushy
6	29	48F5E3FE474EA76DE23D7D0A8F27ADA15F5C98D7	Blacked
	30	4B86BC16D0E5A0983C578B61ED87BC62C55B116A	Vixen
7	31	4F0D3D0FD3F88791F4933080453A052BE6924F22	Tushy
	32	4FAE423CFA8C54409A4658429D7CB2B3E0F2E8B1	Vixen
8	33	4FF62836FC3C509617EE5DE7658EAABE045C0BA1	Tushy
	34	5003D85013A07470D85A3250EF4B3393B6E2CB04	Tushy
9	35	5176733783D1199D43060681D7AE2D4E3B5C9AF9	Blacked
10	36	53FF1B4BD8FB69630FE0A67611FE747F902F6874	Vixen
	37	5A06B4EA4DB48984499F2E9EA7213220E835089D	Blacked
11	38	5AA7FC6E46AEF9EC1227A939EADB3351AD495F12	Vixen
12	39	5C208E2ABF6083135CA52776A02D87442F215D60	Tushy
	40	5F25F5C8970A1123950D8543F0C954308ECC9D12	Tushy
13	41	6503CB2EAECE7FA2F1D71B98E41D6D845BF7B794	Vixen
14	42	6960957E412263AA671D4F7A15737527D71A7C08	Tushy
	43	69AC2D8751ABF0FED5C443A1CE77A7C7529B7AC9	Vixen
15	44	6A53ECB874B094837053EB7B7142560F0A85A9C2	Vixen
16	45	6B9175E9708A1BE765BBDC6582A68A12E44A33E3	Vixen
	46	72F519FE9EED3C466979E55CFEBF253309A8106C	Vixen
17	47	74C66B184CB3F25F69326EF0C5529CDB680A8C47	Vixen
	48	792198F0F41E1FFA44A67E62F451EC11B9B692EF	Vixen
18	49	7E4981D21DDD4B8D9EB5905B1B8A95461915A160	Blacked
19	50	82EC6E9F2A9287FD59C2B571FDC0CDED7EDDBB81	Blacked
20	51	8519F3BB18D38EB8472CD07987B1BC2224E7EC22	Vixen
	52	88D30B83D9E749F514380A5F2E9C3E876CF55431	Tushy
21	53	8D906EA439B8BF052A8D68240F71C6D9ACE1E17A	Vixen
	54	8F55C47AC0C8FED6F30E2C094965B3CF4749FA41	Vixen
22	55	921AED6337A58B159CFAF9DADDFE2D91CDFF8AB3	Tushy
23	56	94E00EDACF46F8763B4B28A29BEB83473AC2BA8E	Blacked
	57	9B5E94F7A0C627798E8020DFAA9A28609D1AB82A	Tushy
24	58	9C80B087C925D30BA01F72FC0EAAABD8EAADF588A	Blacked
25	59	9D5513F0563852D9FB73EDC7D6318A6BB04334D9	Tushy
	60	9E77DF7FCCB30D04DC6500C39CC3EF0AA2B48257	Blacked
26	61	ABC004062B9F9CF37E9A3A57F4BEA161154EECAE	Vixen
27			

62	ABDFB02F5D20E29C32ABCE90A8478787DDA3C11D	Tushy
63	AE6A89DD0FB4978EAC561028F9FB06AA0A8D7E6A	Tushy
64	AFA4C44023577E2A90E1CFA8DB69A6F5D035B1D2	Blacked
65	B2EC2056C7699F25A118F23E36BB74FC7D3B7131	Vixen
66	B80F62F292E7B77184DC0BCF80ECE23CF7B23D15	Tushy
67	BA56E328AE2DBA8A20B327451656293E37FDAE35	Blacked
68	C496C2BFE4C6D994F43DC665F2CBEE16FE85777A	Tushy
69	C59734C1DC4D87F563ABE2D6E371C12FD12FC7D9	Blacked
70	C6965A70345AC1C86DD34737BF381734CA301655	Vixen
71	D2B9C8834073E3BF4B55F7BF45C7EA7BE5903569	Blacked
72	DB6040CB19308F376554AC18F5C883139311322D	Blacked
73	DCE0631B0833B899B8A4C577203A87AD00BD2B8B	Blacked
74	DCE1E033042DA8E7CFC7CEC42B7D21201BEDFD57	Tushy
75	E132114F31A37161B83D12BCE6320B65DE025C9B	Vixen
76	E1C14843DC58F3CB2CCB7383B242E4EE8D32363B	Tushy
77	E272AF63D15A4277BF857E93B225717C76F3DA9D	Tushy
78	E4BB4B0185636612E25A2955F474B4494789F63C	Blacked
79	E69BB37CE99BE570CC9EB659F45DDEF6E740E3BE	Blacked
80	E8910563DE2084C48C6A8C5801457339745A09FA	Vixen
81	EC31FAD9EF2492EACCD767B4A6E207BBF2765F0E	Blacked
82	F1132ADEB75DD2EA99B249DD70902C74E9DA7884	Tushy
83	F28E401CBB99CFB32E0808B7662BC50A9C5F64AD	Blacked
84	F8A92532C263D3E3497FF27A3FE569FF7BF15E37	Blacked
85	F8FEB2EE6C17B37610C5B2AE85F0266CB0C5C5BD	Blacked
86	FF7A5EE06C927438A3CAABC69D774D9CEACA8B9F	Tushy
87	FFD7D4C0A301487B3A11CBF1B3FC16410D42AEA0	Vixen

PCAP – Packet Capture Data (raw data files from the film). Within each movie is at least 16 KB of raw movie data stored in a PCAP. Each raw movie data file has an associated “.torrent” file that is unique to each hash.

- i) .torrent files – A relatively small file that linked to a “torrent site”.
- ii) Movie Name – The title of the movie as recorded at the Copyright Office
- iii) Infringed File Name. – The file name
- iv) Actual Movie Title
- v) The terms “Backed”, “Tushy”, “Vixen”

1
2
3 1. On-site inspection of electronic media.

4 Computers will be first inspected by the Defendant's technician according to the
5 PHASE 1 review below. To minimize cost, inspection will be done by a computer technician.

6 2. Search methodology.

7 The computers and other media will be searched according to Defendant's PHASE I
8 and PHASE II procedures below.

9 3. Format.

10 The format produced will be a native file format that will probably then be reproduced
11 in a PDF format in readable form. Evidence will be kept in native and

12 4. De-duplication. The parties may de-duplicate their ESI production across
13 custodial and non-custodial data sources after disclosure to the requesting party.

14 5. Metadata fields. If the requesting party seeks metadata, the parties agree that
15 only the following metadata fields need be produced: document type; custodian and duplicate
16 custodians; author/from; recipient/to, cc and bcc; title/subject; file name and size; original file
17 path; date and time created, sent, modified and/or received; and hash value.

18
19
20 DEFENDANT'S PHASE 1 REVIEW – COMPUTER AND MEDIA CULLING

21 6. For computers that have a hard drive, the computers will be "booted" and the
22 Defendant's technician will use an accepted forensic tool, such as X-RAYS "WinHex" to inspect
23 the drives. (Cost approx. \$ 500.00) A computer technician (est cost \$ 40.00 per hour) will do a
24 pattern match on each of the five (5) search strings provided by the Plaintiff for the computer
25 hard drive(s.) to Defendant's technician. The date and time of the analysis will be recorded. If a
26
27

1 match is found, then Defendant technician will identify the match and isolate that computer for
2 PHASE 2 REVIEW.

3 7. If there is an external hard drive or other media, then the hard drive will be
4 installed so that it can be read by the forensic tool.

5 8. To limit burden and costs, this PHASE 1 REVIEW will be performed by
6 someone with the skill of a computer technician hired by the Defendant.

7 9. It is estimated that PHASE I will take 40 hours (approx. 20-30 minutes per
8 computer).

9 10. If a computer is inoperable or a hard drive does not work, then this will be
10 noted.

11
12 DEFENDANT’S PHASE 2 REVIEW – LIKELY COMPUTER SOURCES

13 11. The isolated drives identified in the PHASE 1 REVIEW will be available for a
14 Plaintiff’s computer expert who will do a further review according to the following protocol at
15 Defendant’s counsel’s office in Hillsboro, Oregon or in Seattle, Washington. The further review
16 will allow the expert to search for an additional ten (10) “Search Strings” that are from the
17 following data sources:

- 18 a. Hash Hex Identifier Listed Above;
19 b. 16 KB Raw Data Block from a PCAP;
20 c. Infringed Movie Title; and/or
21 d. Actual Movie Title.
22 e. Identification of the particular torrent client identified by Plaintiff’s IPP
23 monitoring software.

F. Discovery Disputes

In the event there are discovery disputes, counsel will meet informally in good faith basis to try and stipulate to issues. Absent resolution, the parties will ask for an informal conference with a discovery magistrate to resolve any issues.

DATED: _____

Plaintiff's Counsel

Defendant's Counsel

By _____ By _____

ORDER

Based on the foregoing, IT IS SO ORDERED.

DATED: _____

The Honorable _____

UNITED STATES DISTRICT JUDGE

EXHIBIT “D”

THE HONORABLE THOMAS S. ZILLY

U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

STRIKE 3 HOLDINGS, LLC, a Delaware
corporation,

Plaintiff,

vs.

JOHN DOE, subscriber assigned IP address
73.225.38.130,

Defendant.

NO. 2:17-cv-01731-TSZ

**DEFENDANT'S BATES INDEX
AND SERVICE OF DOCUMENTS**

JOHN DOE subscriber assigned IP
address 73.225.38.130,

Counterclaimant,

vs.

STRIKE 3 HOLDINGS, LLC,

Counterdefendant.

Defendant hereby serves the following BATES index in response to Plaintiff's request for production of documents. This index is a provided as a reference and is not substantive part of the production response. Bates 10001-10199 are computer equipment, devices, etc. that may be inspected and copied at counsel's office subject to the objections and protective order.

1 Originals documents served on a USB (Bates 10200-10301) drive via mail. PDF
 2 Document Bates 10270-10282, 10301 is designated Attorney Eyes Only.

3 Several documents are graphic in nature.

BATES	Description	Brand/Model	Model	S/N
10001	Computer	Optiplex	GX270	HZHKF1
10002	Computer	Optiplex	GX270	BFJ5441
10003	Computer	Dell	DCNE	D1L0PD1
10004	Computer	Studio	XPS 8000	3MJN HK1
10005	Computer	HP Envy	810 PC series	MXX4320SDM
10006	Computer	HP Pavilion Elite	(HPE-240f)	4CE0221KSF
10007	Computer	OPTIPLEX 790		790 4TZWXV1
10008	Computer	OPTIPLEX 745		745 HZRQPC1
10009	Computer	OPTIPLEX		745 4F1YZC1
10010	Computer	OPTIPLEX 9020		9020 GMWFX12
10011	Computer	OPTIPLEX 9010		9010 20N39W1
10012	Computer	GATEWAY	831-GM	GA5561007728
10013	Computer	OPTIPLEX		960 JNLXTL1
10014	Computer	HP P6000	P6000	CNX92402sc
10015	Computer	Custom Built PC		none
10016	Computer	Gateway	DX4850-27E	PTGBL020010480!0286300
10017	Computer	Aspire	M5630	PSSA50X045744008Cf2
10018	Computer	HP	ELITE 8300	MXL2470D56
10019	Computer	HP	DX 2250	MXL73608d1
10020	Computer	Custom Built PC		none
10021	Computer	Dell	Dimension E31	CKH BW91
10022	Computer	Hard Drives NW		122545
10023	Computer	Shuttle	S113G	SG31G2SO-S00-13
10024	Computer	Dell	Inspiron 570	90G2SL1
10025	Computer	Lenovo	A1U	M5RGK73
10026	Computer	Dell	Inspiron DCMF	4GM2HH1
10027	Computer	Dell	T5500	32SB3L1
10028	Computer	Dell	Inspiron 660	DKDBNy1
10029	Computer	ASUS	CG Series	PRF 105090
10030	Laptop	Dell	PP07S	44HS981
10031	Laptop	Dell	PP18L	0T17570
10032	Laptop	Dell	Latitude E6520	6XSBR1
10033	Laptop	Dell	Latitude E6520	9M2C6R1
10034	Laptop	Dell	Latitude PP04X	669NJF1
10035	Laptop	Dell	Latitude E6520	5H2C6R1
10036	Laptop	Dell	Latitude E6520	1H2C6R1
10037	Laptop	Dell	Latitude E6420	7CZZ6R1
10038	Laptop	Dell	PP31L	8039

1	10039	Laptop	Dell	PP29L	7146
	10040	Laptop	Dell	P02EE002	GKWWQM1
2	10041	Laptop	Dell	P07E	9LCYKL1
	10042	Laptop	Dell	P02E	9JR0RK1
3	10043	Laptop	Sony	PCG-8C3L	283626303717017
	10044	Laptop	ASUS G72G	G27GX	9AN0AS86977944A
4	10045	Laptop	Lenovo 4151	R39Y39C25615	EB16835152
5	10046	Laptop	Acer E5-511	E5-511	NXMPKAA005434104423400
	10047	Laptop	Fujitsu Lifebook	N6410	R6204104
6	10048	Laptop	Gateway	MS2370	NXY2ZAA019412080096600
7	10049	Laptop	Satelite	C655-S5212	5B426377Q
	10050	Console	XBOX	Xbox 360 Conole	913756473305
8	10051	Laptop	Gateway	NAV50	LUWH20D0060035342C1601
9	10052	Router	VIZIO	XWR100	WGKOIEAL4302262
	10053	Router	Linksys	RT31P2-VD	CH500E3H9553
10	10054	Hard Drive	WD	WD600	WMA9S1536850
11	10055	Hard Drive	Seagate	ST315005N1A1AS-RK	9VS1M9Z3
	10056	Hard Drive	Maxtor	D740X-6L	11S24P3662ZJ1JN23SSSZB
12	10057	Hard Drive	WD	WD1200	WMA8C2473896
	10058	Hard Drive	Seagate	ST3200822A	4LJOH0MV
13	10059	Hard Drive	WD	WD1000	WMA8C1145815
14	10060	Hard Drive	Hitachi	HTS548080M9AT00	MRL455L4K558DB
	10061	Hard Drive	Seagate	Momentus 5400.2	3PJ13XQ2
15	10062	Hard Drive	Seagate	Momentus 5400.5	5SV6CHA7
	10063	Hard Drive	Seagate	Momentus 5400.5	5SX09BHB
16	10064	Hard Drive	WD	WD800	WCAM9D729123
17	10065	Hard Drive	WD	WD800	WMAM9ADZ1831
	10066	Hard Drive	WD	WD1200	WMAEL1694798
18	10067	Hard Drive	WD	WD1200	WMA8C2865416
19	10068	Hard Drive	Seagate	Barracuda 7200.9	5PS2VQ5X
	10069	Hard Drive	Fujitsu	MHZ2080BJ	K83AT8826CED
20	10070	Hard Drive	Seagate	Barracuda 7200.9	9LR0L87G
21	10071	Hard Drive	Hitachi	HDS721616PLA380	PVB330Z2S02MBH
	10072	Hard Drive	Seagate	Momentus 7200.4	5VJ12E0L
22				Momentus Thin	
	10073	Hard Drive	Seagate	250GB	W041YEMR
23	10074	Hard Drive	WD	WD1600	WCAL81049956
	10075	Hard Drive	Seagate	Barracuda 7200.9	6PT1SH3
24	10076	Hard Drive	Seagate	Barracuda 7200.9	5ND3P6QH
	10077	Hard Drive	Seagate	Barracuda 7200.10	9QG73DQS
25	10078	Hard Drive	Seagate	ST310211A	6DB0DQMB
26	10079	Hard Drive	WD	WD1600	WCAL92547435
	10080	Hard Drive	Hitachi	HDS721050CLA362	HN1A4SPA
	10081	Hard Drive	Seagate	ST2000DM001	Z1F01GVY

1	10082	Hard Drive	WD	WD800JD	WMAM9UK73521
	10083	Hard Drive	WD	WD10EADS	WCAV54551878
2	10084 A/B	Hard Drive	WD	TBD	TBD
	10085	Laptop #1	Unknown	Unknown	Unknown
3	10086	Laptop #2	Unknown	Unknown	Unknown
	10087	Laptop #3	Unknown	Unknown	Unknown
4	10088	Laptop #4	Unknown	Unknown	Unknown
	10089	Laptop #5	Unknown	Unknown	Unknown
5	10090	Laptop #6	Unknown	Unknown	Unknown
	10091	Laptop #7	Unknown	Unknown	Unknown
6	10092	Laptop #8	Unknown	Unknown	Unknown
	10093	Laptop #9	Unknown	Unknown	Unknown
7	10094	Laptop #10	Unknown	Unknown	Unknown
	10095	Laptop #11	Unknown	Unknown	Unknown
8	10096	Laptop #12	Unknown	Unknown	Unknown
	10097	USB Drive #1	Unknown	Unknown	Unknown
9	10098	USB Drive #2	Unknown	Unknown	Unknown
10					
11					
12	10200	Document	PDF		
	10201	Document	PDF		
13	10202	Document	PDF		
	10203	Document	PDF		
14	10204	Document	PDF		
	10205	Document	PDF		
15	10206	Document	PDF		
	10207	Document	PDF		
16	10208	Document	PDF		
	10209	Document	PDF		
17	10210	Document	PDF		
	10211	Document	PDF		
18	10212	Document	PDF		
	10213	Document	PDF		
19	10214	Document	PDF		
	10215	Document	PDF		
20	10216	Document	PDF		
	10217	Document	PDF		
21	10218	Document	PDF		
	10219	Document	PDF		
22	10220	Document	PDF		
	10221	Document	PDF		
23	10222	Document	PDF		
	10223	Document	PDF		
24	10224	Document	PDF		
	10225	Document	PDF		

1	10226	Document	PDF
	10227	Video	
2	10228	Document	PDF
	10229	Document	PDF
3	10230	Excel	CSV
4	10231	Document	PDF
	10232	Document	PDF
5	10233	Document	PDF
	10234	Document	PDF
6	10235	Document	PDF
7	10236	Document	PDF
	10237	Document	PDF
8	10238	Document	PDF
	10239	Document	PDF
9	10240	Document	PDF
10	10241	Document	PDF
	10242	Document	PDF
11	10243	Document	PDF
	10244	Document	PDF
12	10245	Document	PDF
13	10246	Document	PDF
	10247	Document	PDF
14	10248	Document	PDF
	10249	Document	PDF
15	10250	Document	PDF
16	10251	Document	PDF
	10252	Document	PDF
17	10253	Document	PDF
	10254	Document	PDF
18	10255	Document	PDF
	10256	Document	PDF
19	10257	Document	PDF
20	10258	Document	PDF
	10259	VIDEO	MP4
21	10260	Document	PDF
	10261	Document	PDF
22	10262	Document	PDF
	10263	Document	PDF
23	10264	Document	PDF
	10265	Document	PDF
24	10266	Document	PDF
	10267	Video	MP4
25	10268	Video	MP4
	10269	Document	PDF

1	10270	Document	PDF
2	10271	Document	PDF
3	10272	Document	PDF
4	10273	Document	PDF
5	10274	Document	PDF
6	10275	Document	PDF
7	10276	Document	PDF
8	10277	Document	PDF
9	10278	Document	PDF
10	10279	Document	PDF
11	10280	Document	PDF
12	10281	Document	PDF
13	10282	Document	PDF
14	10283	Document	PDF
15	10284	Document	PDF
16	10285	Document	PDF
17	10286	Document	PDF
18	10287	Document	PDF
19	10288	Document	PDF
20	10289	Document	PDF
21	10290	Document	PDF
22	10291	Document	PDF
23	10300	Document	PDF
24	10301	Document	PDF
25	10302	Document	PDF

Respectfully submitted on March 18, 2019

By: /s/ J. Curtis Edmondson
J. Curtis Edmondson, WSBA #43795
3699 NE John Olsen Avenue
Hillsboro, Oregon 97124
Telephone: (503) 336-3749
Email: jcedmondson@edmolaw.com

Attorney for Defendant

CERTIFICATE OF SERVICE

I, J. Curtis Edmondson, hereby certify that on March 18, 2019, I mailed this document and the referenced documents on USB (bates 10200-10302) the foregoing to the following:

Bryan J. Case, WSBA #41781
Email: bcase@foxrothschild.com
FOX ROTHSCHILD LLP (SEATTLE)
1001 Fourth Avenue, suite 4500
Seattle, Washington 98154
Telephone: (206) 624-3600

Lincoln D. Bandlow, *Admitted Pro Hac Vice*
Email: lbandlow@foxrothschild.com
FOX ROTHSCHILD LLP (LOS ANGELES)
10250 Constellation Blvd., Suite 900
Los Angeles, California 90067
Telephone: (310) 598-4150

Attorneys for Plaintiff Strike 3 Holdings LLC

By: /s/ J. Curtis Edmondson
J. Curtis Edmondson

EXHIBIT “E”



AMENDED DIGITAL FORENSICS EXAMINATION REPORT

Regarding:
Strike 3 Holdings, LLC v. John Doe
Case Number: 2:17-CV-01731-TSZ

Prepared for:
Curtis Edmondson
Edmondson IP Law
3699 NW John Olsen Place
Hillsboro, OR 97124

Prepared by:
Michael Yasumoto
Deadbolt Forensics® LLC
1500 NW Bethany Blvd, #200
Beaverton, OR 97006

Amended Report: April 15, 2019
Original Report: March 15, 2019

I. Assignment

My name is Michael Yasumoto. I was retained on March 6, 2018 by Curtis Edmondson of Edmondson IP Law which represents John Doe. I have been retained to conduct a forensic examination of the defendant's hard drive in this case. Specifically, I have been asked to determine the following.

- 1) Are any of the movies listed in Plaintiff's complaint located on the Defendant's hard drive?
- 2) Document the computer the hard drive originally came from on March 6, 2018.

II. Qualifications

I hold an MS in Computer Science from the George Washington University (GWU). I am certified in Computer Security by GWU as well as certified in Computer Forensics by Edmonds Community College. My curriculum vitae is attached to this report as Exhibit 1.

III. Compensation

I am being compensated at a rate of \$250 per hour for my time in this matter. My fees are not contingent upon the outcome of this litigation.

IV. Evidence Collection and Analysis

I have reviewed the following documents:

- A. Exhibit A to the Complaint, 6 pages, 07/03/18 Document 43-1.
- B. "PCAP analysis (Case 17-cv-01731-TSZ) v3.xlsx", 1 Worksheet.

Imaging

I created a forensically sound image of the hard drive listed in Table 1 using a CRU Forensic UltraDock v5.5 write blocker on 3/7/2018. The hard drive was imaged using X-Ways Forensics (XWF) to create an image in EWF/.E01 format. The hard drive with serial# 9VP05TWX was picked up from Curtis Edmondson's office on 3/6/2018 and returned on 3/9/2018.

Four copies of the forensic image were created. One is stored at Deadbolt Forensics for examination. Another copy is stored at Curtis Edmondson's office. Copies three and four were

1 provided to Curtis Edmondson's office and are identified by bates numbers 10084A and
2 10084B.

Make	Model	Serial#	Hash (SHA1)
Seagate	ST3750528AS	9VP05TWX	C030EFD65D37609FA736FAA2924D6636F96BF4CB

3 Table 1: Defendant's Hard Drive

4

5 On 4/10/2019, I examined the computer containing the hard drive with serial# 9VP05TWX at
6 Curtis Edmondson's office. The computer's make and model are listed in Table 2 however the
7 manufacturer did not explicitly identify any serial numbers on the computer's case. Two
8 potential serial numbers printed on the case are listed in Table 2.

Make	Model	Serial#
Asus	CG5270-BP003	PF1G95B15000014 or 95PDAG039530

9 Table 2: Defendant's Computer

10

11 Analysis

12 I used XWF version 19.8 SR3 to examine the forensic image. Using XWF, I searched for all video
13 files including deleted files recovered from unallocated space. I conducted file carving, which
14 looks for signatures of certain file types to detect data that may be hidden inside another file or
15 located in unallocated space such as deleted files. The smallest video file referenced in Exhibit
16 A of the complaint is approximately 187 MBs in size. Based on a review of plaintiff's videos,
17 they appear to have an introduction and concluding animation featuring the name of either
18 Tushy, Vixen, or Blacked. I reviewed all recovered and existing video files over 100 MBs in size
19 to determine if any of the video files were Plaintiff's copyrighted works. None of the videos
20 examined appear to be Plaintiff's work based on content and the lack of any Tushy, Vixen, or
21 Blacked animated titles. I also compared the SHA1 hash, which acts as a fingerprint for
22 computer files, and none of the videos examined on defendant's computer were a hash match
23 for the videos listed in Exhibit 3.

24

V. Conclusions

Plaintiff's Videos Not Found

It is my opinion, based on a reasonable degree of scientific certainty, that the movies listed in Exhibit 3 are not located on the storage devices that I examined in Table 1.

Basis:

- None of the video files reviewed from the Defendant's hard drive are the Plaintiff's movies based on video subject matter or SHA1 hash.

Defendant's Hard Drive

It is my practice, working with Curt Edmondson, to preserve and examine the hard drive of the computer at issue in the case. It is my understanding that the hard drive that I preserved and examined on 3/6/2018 was the only hard drive from the client's working desktop.

My opinion is based upon the information available at the time of the writing of this report. I reserve the right to expand, amend, or change my opinions upon receipt of additional pertinent information, should it be presented to me for review.

I declare under penalty of perjury that the foregoing is true and correct.

Michael Yasumoto 4/15/2019

Michael Yasumoto

Date

Appendix: Exhibit List

Exhibit 1:

Curriculum Vitae for Michael Yasumoto

- 1 [Exhibit 2:](#)
- 2 FRCP 26(a)(2)(B) Testimony Disclosure for Michael Yasumoto
- 3 [Exhibit 3:](#)
- 4 Exhibit A to the Complaint, 6 pages, 07/03/18 Document 43-1.

EXHIBIT “F”

From: J. Curtis Edmondson <jcedmondson@edmolaw.com>
Sent: Saturday, February 2, 2019 8:13 AM
To: Case, Bryan J. <bcase@foxrothschild.com>
Cc: Bandlow, Lincoln D. <ibandlow@foxrothschild.com>
Subject: [EXT] Meet and Confer re: stip to ESI Protective Order / WDWA Model ESI Agreement (our file: DIS 1.002)
Importance: High

Lincoln and Bryan,

Your client has asked for the production of ESI in your first discovery request. It is our position that the production of computer hard drives is not a proportionate discovery request under the amended Rule 26 and will allow your client access to data that is irrelevant to this case, personal to my client, and may result in your inspection of attorney-client correspondence.

To avoid our motion for a protective order, will you stip to the WDWA model ESI agreement in the form of a stipulated protective order for both parties? In particular, I would propose that you present "search strings" that would indicate the presence of the movies or other data that believe are pertinent to this case.

If your not amenable to this approach, then I would like to meet and confer on this topic.

In Best Regards,

J. Curtis Edmondson, Patent Attorney | Edmondson IP Law
USPTO 57027 | CA SBN 236105 | WA SBN 43795 | DC BAR NO 998407 | CA PE 13377| WA PE 43728
Venture Commerce Center, 3699 NE John Olsen Ave, Hillsboro OR 97124
ph: (503) 336-3749 | fax: (503) 482-7418
jcedmondson@edmolaw.com | www.edmolaw.com

From: Case, Bryan J. <bcase@foxrothschild.com>
Sent: Thursday, March 21, 2019 5:41 PM
To: Adrienne McEntee <amcentee@terrellmarshall.com>; J. Curtis Edmondson <jcedmondson@edmolaw.com>
Cc: Bandlow, Lincoln D. <ibandlow@foxrothschild.com>
Subject: Strike 3 v. Doe - Model ESI Agreement

Adrienne and Curt,

Attached please find our edits to the model ESI agreement. Please let us know if you have any changes ASAP so we can move forward with discovery without further delay, in particular inspection of Defendant's computer devices you've disclosed.

Bryan

Bryan Case

Partner

Fox Rothschild LLP

1001 Fourth Avenue, Suite 4500

Seattle, Washington 98154-1192

Direct: (206) 389-1643

Cell: (425) 890-5112

Fax: (206) 389-1708

bcase@foxrothschild.com

www.foxrothschild.com

This email contains information that may be confidential and/or privileged. If you are not the intended recipient, or the employee or agent authorized to receive for the intended recipient, you may not copy, disclose or use any contents in this email. If you have received this email in error, please immediately notify the sender at Fox Rothschild LLP by replying to this email and delete the original and reply emails. Thank you.

From: "J. Curtis Edmondson" <jcedmondson@edmolaw.com>

Date: March 22, 2019 at 5:52:42 AM PDT

To: "Case, Bryan J." <bcase@foxrothschild.com>, Adrienne McEntee <amcentee@terrellmarshall.com>

Cc: "Bandlow, Lincoln D." <ibandlow@foxrothschild.com>, <jcedmondson@edmolaw.com>

Subject: [EXT] Re: Strike 3 v. Doe - Model ESI Agreement

Bryan and Lincoln,

Attached is our proposed ESI protective order. When this case started, I proposed that we discuss ESI and there was not much of a response from your side. Now that we are down to the wire, I have put together a reasonable protocol in view of your remaining claims (of which there are none) and your affirmative defenses (of which there are a few). I have already spent a significant amount of time collecting and organizing these computers.

The number of computers being produced is a result of your overly broad discovery requests, which are cut/paste from the discovery requests that Malibu Media would send out from the Lipscomb law firm. These discovery requests were designed by the Lipscomb firm to increase the litigation costs to the defendant and force a settlement.

I have crafted a cost effective ESI order where Defendant will bear the initial cost of inspecting computers. The majority of these computers were bought from Goodwill and eBay and may still have the prior owners data on them.

Please let me know if my ESI order is acceptable. Your ESI order will not work as it is overly broad, imposes large unnecessary costs, and is disproportionate to what is needed to prove your affirmative defenses.

B. Regards,

J. Curtis Edmondson, Patent Attorney | Edmondson IP Law

USPTO 57027 | CA SBN 236105 | WA SBN 43795 | DC BAR NO 998407 | CA PE 13377 | WA PE 43728

Venture Commerce Center, 3699 NE John Olsen Ave, Hillsboro OR 97124

ph: (503) 336-3749 | fax: (503) 482-7418

jcedmondson@edmolaw.com | www.edmolaw.com

From: Case, Bryan J. <bcase@foxrothschild.com>

Sent: Monday, March 25, 2019 4:27 PM

To: J. Curtis Edmondson <jcedmondson@edmolaw.com>; Case, Bryan J. <bcase@foxrothschild.com>;

Adrienne McEntee <amcentee@terrellmarshall.com>
Cc: Bandlow, Lincoln D. <ibandlow@foxrothschild.com>
Subject: RE: Strike 3 v. Doe - Model ESI Agreement

Curt,

In an effort to work cooperatively, attached are Strike 3's edits to the ESI agreement you sent on Friday. Please let us know if you have any changes or disagreements with the attached. If so, counsel should schedule a discovery conference to discuss.

Regards,

Bryan

Bryan Case
Partner
Fox Rothschild LLP
Direct: [\(206\) 389-1643](tel:2063891643)
Cell: [\(425\) 890-5112](tel:4258905112)

From: Adrienne McEntee <amcentee@terrellmarshall.com>
Sent: Tuesday, March 26, 2019 3:11 PM
To: Case, Bryan J. <bcase@foxrothschild.com>; J. Curtis Edmondson <jcedmondson@edmolaw.com>
Cc: Bandlow, Lincoln D. <ibandlow@foxrothschild.com>
Subject: [EXT] RE: Strike 3 v. Doe - Model ESI Agreement

Bryan, Curt and I would like to meet and confer with you regarding the revisions to our proposed ESI order. Are you available on Friday?

Adrienne D. McEntee
Terrell | Marshall Law Group PLLC
936 N 34th Street, Suite 300 | Seattle, WA 98103
T [206.816.6603](tel:2068166603) | F [206.319.5450](tel:2063195450)

From: Bandlow, Lincoln D. <ibandlow@foxrothschild.com>
Sent: Tuesday, March 26, 2019 7:50 PM
To: Adrienne McEntee <amcentee@terrellmarshall.com>; Case, Bryan J. <bcase@foxrothschild.com>; J. Curtis Edmondson <jcedmondson@edmolaw.com>
Subject: RE: Strike 3 v. Doe - Model ESI Agreement

Bryan is unavailable but I can do the call. I have a deposition the first half of the day, so Friday at 4:00 p.m.?

Lincoln Bandlow
Partner

Fox Rothschild LLP

10250 Constellation Blvd., Suite 900

Los Angeles, CA 90067

[\(310\) 228-2913](tel:(310)228-2913) - direct

(310) 556-9828- fax

lbandlow@foxrothschild.com

www.foxrothschild.com

From: Adrienne McEntee <amcentee@terrellmarshall.com>

Sent: Wednesday, March 27, 2019 8:59 AM

To: Bandlow, Lincoln D. <lbandlow@foxrothschild.com>; Case, Bryan J. <bcase@foxrothschild.com>; J.

Curtis Edmondson <jcedmondson@edmolaw.com>

Subject: [EXT] RE: Strike 3 v. Doe - Model ESI Agreement

Friday at 4pm works fine. My office will circulate a conference line.

Adrienne D. McEntee

Terrell | Marshall Law Group PLLC

936 N 34th Street, Suite 300 | Seattle, WA 98103

T [206.816.6603](tel:206.816.6603) | F [206.319.5450](tel:206.319.5450)

EXHIBIT “G”

AMENDED EXPERT REPORT OF ERIC FRUITS, PH.D.
IN THE MATTER OF

STRIKE 3 HOLDINGS, LLC

v.

JOHN DOE, SUBSCRIBER
ASSIGNED IP ADDRESS 73.225.38.130

CASE NO. 2:17-CV-01731-TSZ
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

Economics International Corp.
503-928-6635
www.econinternational.com
info@econinternational.com

April 15, 2019

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4 DMCA notices as a method to discourage infringement.....	7
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6 Nuisance lawsuits and sue-then-settle strategies	11
7 Plaintiff's revenues from settling litigation.....	17
8 Damages.....	19
9 Conclusion	20

Exhibits

- 1 Curriculum vitae

Summary of conclusions

I have been retained by counsel for Defendant in this matter to provide an economic opinion regarding damages in this matter.

Plaintiff's amended complaint alleges that, using BitTorrent, Defendant copied and distributed 87 works in which Plaintiff is the owner of the copyrights-in-suit and thereby willfully infringed on Plaintiff's copyrights. Plaintiff is seeking, *inter alia*, statutory damages. The following are my conclusions.

- Litigation is not the only way for Plaintiff to stop infringement. If the volume of complaints filed by Strike 3 are an indication of actual infringement, it seems obvious that the filing of lawsuits is not "effective" in deterring infringement.
- DMCA notices are one method to discourage infringement. At the time of the downloading activity alleged by Plaintiff, Defendant's Internet service provider, Comcast, indicates it had policies to comply with the DMCA, including, "a policy to terminate the Service, in appropriate circumstances, provided to any customer or user who is a repeat infringer of third party copyright rights."
- Plaintiff's actions in this suit, and others, are consistent with a theory that plaintiff is pursuing nuisance value settlements, using the prospect of statutory damages and litigation expenses to extract quick settlements of low-probability-of-prevailing claims. Strike 3's strategy in BitTorrent litigation appears to satisfy a three-part test for nuisance value litigation.
- Additional information from Plaintiff would be useful to more comprehensively evaluate Plaintiff's income from pursuing and settling litigation.

The remainder of the report provides the bases for the conclusions summarized above. ■

**STRIKE 3 HOLDINGS, LLC v.
JOHN DOE, SUBSCRIBER
ASSIGNED IP ADDRESS 73.225.38.130**

ERIC FRUITS, PH.D.

1 Qualifications

I am president and chief economist at Economics International Corp., a consulting firm that specializes in providing economics services to private and public sector clients. I am also an adjunct professor at Portland State University, where I teach courses in economics and real estate. I have a masters' and a doctorate degree in economics and a bachelors' degree in business economics and public policy. Exhibit 1 is a current curriculum vitae including testimony and publications.

My graduate-level training included the study of statistics and econometrics (the application of statistical methods to economics issues). I have taught graduate-level courses in economics, econometrics, finance, and the economics of regulation and antitrust. I have published several peer-reviewed papers, each of which have included statistical and econometric analysis.

I have been engaged in many projects involving financial analysis and business valuation. I have testified in federal and state courts on business and technology valuation and financial markets. As an economic damages expert, I have provided expert testimony regarding business valuation, lost profits, and foregone income. I have consulted and testified in several matters involving the

valuation of intellectual property, including the valuation of technology, trade marks, and trade dress. I have provided expert opinions involving statistics, economics, and finance to United States of America federal and state courts and to an international criminal tribunal.

I am familiar with BitTorrent litigation. I served as an economics expert in the case of *Malibu Media, LLC v. Doe subscriber assigned IP address 76.126.99.126* in the Northern District of California. I served as an economics expert in the case of *Clear Skies v. Hancock* in the Northern District of Illinois. I served as an economics expert in the case of *QOTD v. Wilson* in the Western District of Washington.

Economics International Corp. is compensated at an hourly rate of \$350 for my work on this matter. No part of the compensation is dependent on the outcome of the matter.

2 Assignment and background

I have been retained by counsel for Defendant in this matter to provide an economic opinion regarding damages in this matter.

Plaintiff's amended complaint alleges that, using BitTorrent, Defendant copied and distributed 87 works in which Plaintiff is the owner of the copyrights-in-suit and thereby willfully infringed on Plaintiff's copyrights. Plaintiff is seeking, inter alia, statutory damages.

Greg Lansky made a declaration under a penalty of perjury at Docket 4-3. Greg Lansky states he has "...personal knowledge of all matters contained in this declaration...". I note that at Docket 70, made a different declaration about his knowledge. For this purposes of this motion, I will assume Docket 4-2 is accurate and not contradicted by Docket 70.

Relevant parts of the Lansky Declaration (4-2) state:

1. "Unfortunately, piracy is a major threat to our company. We can compete in the industry, but we cannot compete when our content is stolen." (§22)
2. "We have discovered that when we put videos online for paid members to view, it takes as little as four minutes to be downloaded on to torrent

websites. We have attempted to identify the initial seeder but have found it impossible with the large volume of our subscriber base.” (§23)

3. “We send on average 50,000 DMCA notices a month but it does virtually nothing to stop the rampant copyright infringement.” (§26)
4. “The only effective way to stop piracy of our movies on BitTorrent is to file lawsuits like this one.” (§27).

I am not offering any analysis, conclusions, or expert opinions regarding the law. To the extent this report refers to laws, court decisions, and/or legal opinions, my analysis is based on an economic evaluation of the information presented.

I have no opinions regarding liability in this matter.

In preparing this report, I have relied on my general expertise and knowledge regarding economics, finance, and statistics as well as publicly available information and information provided by Defendant and/or Defendant’s counsel. The materials relied upon are cited in the text and footnotes to this report. Any of the information referred to in this report and its exhibits, as well as summaries or exhibits based on this information, may be used at trial.

I understand that discovery is not complete. I reserve the right to supplement or modify my report and opinions as new or additional information is presented, obtained, or reviewed or new or additional analyses are completed, including analyses provided by Plaintiff or its experts.

This amended report incorporates by reference my declaration in this matter dated February 25, 2019 (Dckt. 81).

3 Litigation is not the only effective way to stop infringement

The Lansky Declaration claims filing lawsuits against individual alleged downloaders is “the only effective way to stop” infringing downloading of its copyrighted material.

Strike 3 has filed more than 2,700 complaints in federal court alleging copyright infringement. Filing fees alone amount to more than \$1.1 million.

Since the date of the Lansky Declaration, Strike 3 has filed more than 2,600 complaints alleging copyright infringement. In the first two months of 2019, Strike 3 had filed more than 360 complaints. If the volume of complaints filed by Strike 3 are an indication of actual infringement, it seems obvious that the filing of lawsuits is not “effective” in deterring infringement.

The Lansky Declaration claims Strike 3 was formed in 2015. Prior to the formation of Strike 3, Malibu Media, LLC filed nearly 3,300 complaints alleging copyright infringement similar to the claims Strike 3 is making in this case. Mr. Lansky claims he was involved in the industry for approximately nine years before forming Strike 3. His declaration indicates that he was sufficiently familiar with the industry to conclude, “the industry and I were not offering the best quality and experience possible.” As someone with nearly a decade of experience in the industry, it would be reasonable to conclude that Mr. Lansky was aware of the highly publicized Malibu Media cases and had an understanding of the pervasiveness of alleged copyright infringement of pornographic works. It defies economic reasoning and common sense that Mr. Lansky would form his business and—as he says in his declaration—“risk everything” without a strategy to mitigate the costs of anticipated efforts to infringe on Strike 3’s works.

Forensic watermarking of content is a well-known and widely used technique to identify individuals distributing infringing content and has been available prior to the formation of Strike 3.¹ Trade publication Streaming Media notes: “Forensic watermarking allows content owners and rights holders to identify pirated content online, then alert internet service providers, who can then issue a warning to the infringing user or even shut off the user’s subscription.”² Using such a service, Strike 3 can identify which of its subscribers is uploading infringing content and take immediate action, such as cancelling the uploaders’ subscriptions to Strike 3’s services.

¹ See, for example: Trabelsi, W. and M. H. Selmi. Multi-signature robust video watermarking. *2014 1st International Conference on Advanced Technologies for Signal and Image Processing (ATSIP)*, pp. 158-163. 2014.

² Krefetz, N. Protecting your assets: How studios secure their premium video. *Streaming Media Magazine*. September 28, 2018. <https://www.streamingmedia.com/Articles/Editorial/Featured-Articles/Protecting-Your-Assets-How-Studios-Secure-Their-Premium-Video--127701.aspx>, retrieved February 22, 2019.

Custos Media Technologies (RF) (Pty) Ltd. provides a service named “Screener Copy.” The service adds a unique watermark and embeds a Bitcoin bounty to each video file distributed to users. The watermark and bounty make each copy identifiable and traceable. “Bounty hunters” on the Internet scan video files for the hidden Bitcoin bounties and, once found, claim it as a reward. Once the bounty is claimed, the copyright owner is notified of the leaked copy. Because the bounty is unique to each copy, the copyright owner can identify the source of the leak.³ Custos indicates it was designed to serve “smaller movie producers” and claims of 130,000 copies of material it has distributed, the service has “not had a single leak.”⁴ Based on information available at the time of this report, it is likely that Custos’ service or similar services would more effective and less costly than Strike 3’s litigation strategy.

4 DMCA notices as a method to discourage infringement

The Lansky Declaration states Strike 3 sends an average of 50,000 DMCA notices a month, but that the notices do “virtually nothing” to stop infringement of its copyrights.

Citing *In re Charter Commc’ns, Subpoena Enforcement Matter*, 393 F.3d at 773 (8th Cir. 2005), the court in *BMG Rights Mgmt. (US) LLC v. Cox Commc’ns, Inc.* (E.D. Va., 2016) notes:

Congress enacted the Digital Millennium Copyright Act (“DMCA”), which sought to strike a balance “between the interests of ISPs in avoiding liability for infringing use of their services and the interest of copyright owners in protecting their intellectual property and minimizing online piracy.” In return for a certain

³ Custos Media Technologies (RF) (Pty) Ltd. Custos Video: A simple one-click solution for filmmakers and videographers. 2017. <https://custostech.com/custos-video/>, retrieved February 22, 2019.

⁴ Lourie, G. This SA startup is fighting global problem of online piracy using Bitcoin blockchain. *TechFinancials*. June 21, 2018. <https://techfinancials.co.za/2018/06/21/this-sa-startup-is-fighting-global-problem-of-online-piracy-using-bitcoin-blockchain/>, retrieved February 22, 2019.

amount of cooperation, ISPs would enjoy the protection of four liability-limiting safe harbors. To be eligible, an ISP must, for example, “adopt[] and reasonably implement[], and inform[] subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.” [footnotes and citations omitted]

From an economics approach, the idea to “strike a balance” recognizes that the purpose of copyright enforcement under the DMCA is to discourage infringement while reducing the costs associated with litigation.

At the time of the downloading activity alleged by Plaintiff, Defendant’s Internet service provider, Comcast, indicates it had policies to comply with the DMCA:⁵

Owners of copyrighted works who believe that their rights under U.S. copyright law have been infringed may take advantage of certain provisions of the Digital Millennium Copyright Act of 1998 (the “DMCA”) to report alleged infringements to us. In accordance with the DMCA and other applicable laws, Comcast also maintains a policy to terminate the Service, in appropriate circumstances, provided to any customer or user who is a repeat infringer of third party copyright rights.

I understand that Plaintiff has not provided any information demonstrating that Strike 3 notified Comcast of Defendant’s alleged activity outside of the present litigation.

Monitoring companies like Rightscorp, Inc. send DMCA notices on behalf of other media companies to the IP address of alleged infringers. In these notices, requests are made to pay for the works allegedly infringed. In some cases, the infringers have paid for the works allegedly infringed. In other cases, the notices have been associated with a cessation of the alleged infringing activity. In either

⁵ Comcast Corporation. Acceptable use policy for XFINITY® Internet. October 11, 2017. <https://web.archive.org/web/20171011050118/www.xfinity.com/Corporate/Customers/Policies/HighSpeedInternetAUP.html>, retrieved February 22, 2019.

case, if the objective of Strike 3 is to reduce alleged infringement, this approach would be more beneficial to Strike 3 than filing lawsuits. The notice requesting payment would provide an infringer the incentive to convert to a subscriber. A notice to subscriber who is not the infringer could result in proactive actions to prevent infringement, such as changing a wi-fi password. Since the cost of sending a DMCA notice is de minimis, and since a DMCA notice can be sent in a more timely manner than filing a lawsuit, this approach is less costly and more effective than pursuing lawsuits against, what Plaintiff describes as “the worst” infringers.

I understand a 30(b)(6) deposition was taken of Strike 3. I have not had an opportunity to review the deposition transcript. Upon discussion with Defendant’s counsel, I understand no objective reasons were presented indicating why DMCA notice cannot be sent to the IP address associated with a subscriber. Upon review of the transcripts, I intend to supplement my report.

5 Actual and statutory damages

17 USC 504 identifies two remedies for copyright infringement.

1. **Actual damages and profits:** a quantifiable monetary loss the plaintiff has suffered, or the profit the infringer has gained, from infringing the copyrights. I understand Plaintiff has not made a claim that Defendant gained a profit from the alleged copyright infringement. A quantifiable monetary loss to Plaintiff can be calculated by identifying what Plaintiff would have received had it sold or licensed the works.
2. **Statutory damages:** an amount in the range of \$750 to \$30,000 per infringed work. In some circumstances, including those in which the infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court may reduce the award of statutory damages to \$200.

I understand that Plaintiff sought statutory damages and did not specify the range of statutory damages sought (Complaint, Docket 1).

When this complaint was filed, statutory damages for 80 works was sought. Then, I understand Plaintiff amended its complaint and sought statutory

damages for 87 works. Likewise, Plaintiff did not specify the range of statutory damages sought.

In my experience defendants have been more concerned with the maximum exposure to damages than the likely exposure to damages. This is likely more significant in a case such as this, in which the Plaintiff is represented by a large national law firm having hundreds of attorneys.

For the range of statutory damages specified by 17 USC 504, and assuming Defendant is liable for infringing on all 87 works, damages would be in the range of \$62,250 and \$2,610,000.

In a similar BitTorrent case, the court concludes statutory damages are not intended to serve as a windfall to plaintiffs:⁶

Plaintiff argues that a significantly higher award is necessary to force people like Defendants to appear and participate in these BitTorrent cases. Plaintiff apparently wants the Court to raise the statutory damage award to an amount that is at or above the anticipated costs of defending this action. A defendant may, however, decide that conceding liability through default is the best course of action given the nature of the claims and the available defenses. The “punishment” for that choice is the entry of default judgment and an award of damages under the governing standards. As discussed above, those standards lead to the conclusion that the minimum statutory penalty should apply in this case. Plaintiff offers no support for the proposition that participation in federal litigation should be compelled by imposing draconian penalties that are out of proportion to the harm caused by Defendants’ actions or any benefits derived therefrom. Statutory damages are not intended to serve as a windfall to plaintiffs and will not be used to provide such a windfall here.

I reserve the right to supplement or modify my report if Plaintiff or its experts provide a quantifiable claim for damages.

⁶ *CELL Film Holdings, LLC v. Roger Hawkins*, Order Granting in Part Cell Film Holdings’ Motions for Default Judgment, Case 2:16-cv-01091-RSL (W.D. Wash, March 14, 2019).

6 Nuisance lawsuits and sue-then-settle strategies

Plaintiff's actions in this suit, and others, is consistent with a theory that plaintiff is pursuing nuisance-value settlements, using the prospect of statutory damages and litigation expenses to extract quick settlements of low-probability-of-prevailing claims.

One of the earliest models of a sue-then-settle strategy finds that with low costs of filing a suit, plaintiffs can gather valuable information about the strength of their claim from a defendant's response:⁷

A strategy such as [file suit, then go to trial if the defendant offers to settle, otherwise drop the action] may not at first seem to make much sense. Why does the plaintiff not grab the settlement when it is offered? Further reflection reveals that such a strategy may be quite appropriate where the defendant has information not available to the plaintiff. For instance, it might be that the defendant has chosen [to offer to settle if violator, otherwise do not offer to settle]. For the plaintiff then, the defendant's offer to settle is an indication that the defendant did in fact violate the law, so that the plaintiff may prefer to increase his winnings by going to trial. On the other hand, the defendant's refusal to offer to settle may be an indication that he did not violate the law, in which case the plaintiff would want to cut his losses. ...

Put differently, the plaintiff's first strategy, (do not sue), is dominated by his fifth strategy, [file suit, then go to trial if the defendant offers to settle, otherwise drop the action]. We conclude that the plaintiff will always bring an action.

This surprising result is implied by the assumption that the plaintiff incurs no legal costs by filing an action and then dropping it. Given the assumption, the conclusion is quite intuitive: the plaintiff loses nothing from filing suit.

⁷ P'ng, I. P. L. (1983). Behavior in suit, settlement, and trial. *Bell Journal of Economics*, 14(2): 539–550.

Another early model of “nuisance suits” concludes that although a defendant knows that the plaintiff will drop the case if the defendant responds, the defendant will still be willing to pay a settlement amount of up to the cost of responding solely in order to avoid having to make such a response.⁸

P’ng (1983) applies his sue-then-settle model to what he calls “frivolous suits:”

To some extent, this result accords with the folklore: a plaintiff brings a frivolous action in the hope of extorting a settlement that is less than the value of the defendant’s legal costs. The analysis also points to another possibility: the defendant may be able to deter plaintiffs who have filed actions from bringing these to trial by adopting a strategy of refusing to settle, whatever his true type.

The economic rationale for damages is to make the Plaintiff “whole” and/or to deny the liable party of the profits of from the wrongful act. Concepts of the efficient allocation of resources conclude that laws, institutions, or arrangements that provide a windfall profit to plaintiffs would result in a misallocation of resources. Legal scholars have implicitly incorporated the economic approach in their attempts to define a copyright “troll:”⁹

A copyright troll is a plaintiff who seeks damages for infringement upon a copyright it owns, not to be made whole, but rather as a primary or supplemental revenue stream.

The following attempt to define “trolling” recognizes the process of searching or prowling for potential revenues from litigation:¹⁰

The essence of trolling is that the plaintiff is more focused on the business of litigation than on selling a product or service or licensing their IP to third parties to sell a product or a service. The paradigmatic troll plays a numbers game in which it targets hundreds or thousands of defendants, seeking quick settlements

⁸ Rosenberg, D. and S. Shavell (1985). A model in which suits are brought for their nuisance value. *International Review of Law and Economics*. 5(1): 3–13.

⁹ DeBriyn, J. (2012). Shedding light on copyright trolls: An analysis of mass copyright litigation in the age of statutory damages. *UCLA Entertainment Law Review*, 19(1): 79–112.

¹⁰ Sag, M. (2015). Copyright trolling: An empirical study. *Iowa Law Review*, 100(3): 1105–1147.

priced just low enough that it is less expensive for the defendant to pay the troll rather than defend the claim.

Greenberg (2015) identifies the role statutory damages may play in the misallocation of resources for a copyright owner who “uses the prospect of statutory damages and litigation expenses to extract quick settlements of often weak claims.”¹¹

Commenting on the doctrine of copyright misuse, Judge Posner noted the following: “hoping to force a settlement or even achieve an outright victory over an opponent that may lack the resources or the legal sophistication to resist effectively, is an abuse of process.”¹²

Consistent with Posner’s observation regarding opponents with a “lack of resources,” AIPLA (2011) reports the median cost of litigating copyright infringement through the end of discovery in the West is \$150,000.¹³

Sudarshan (2008) proposes a three-part test to identify nuisance value patent litigation, which could be applied to copyright suits (citations omitted):¹⁴

This Article relies on nuisance-value patent litigation having three specific and necessary definitional conditions.

1. First, the patent holder offers a settlement (or license) figure which is significantly less than the cost of defending the suit through the discovery phase of a trial.
2. Second, this settlement amount does not correspond to traditional measures of patent damages, i.e., reasonable royalty or lost profits.

¹¹ Greenberg, B. A. (2015). Copyright trolls and common law. *Iowa Law Review Bulletin*, vol. 100:77–86.

¹² *Assessment Techs. of WI, LLC v. Wire Data, Inc.*, 350 F.3d 640 (2003).

¹³ American Intellectual Property Law Association (2011). *Report of the Economic Survey*.

¹⁴ Sudarshan, R. (2008). Nuisance-value patent suits: An economic model and proposal, *Santa Clara High Technology Law Journal*, 25(1):159-189.

3. Third, the plaintiff seeks to avoid litigation because of a sufficiently high probability that the asserted claims are a) invalid, or b) not infringed by the defendant's products.

This definition recognizes that a suit is not necessarily a nuisance suit just because the offered settlement amount is less than the cost of defense. For example, the second prong of the definition excludes situations where a defendant's infringement may have been so minor that a license would have been worth less than the cost of asserting the patent in litigation. Similarly, the third prong of the definition leaves out scenarios where a plaintiff's validity and infringement contentions are meritorious, but a steep discount may have been given to the defendant for any number of reasons.

Based on information available at the time of this report, Strike 3's strategy in BitTorrent litigation appears to satisfy Sudarshan's (2008) three-part test for nuisance value litigation.

Sag (2015) suggests that sue-then-settle actions are consistent with a theory that plaintiffs are pursuing nuisance value settlements:¹⁵

After obtaining the names and addresses of account holders suspected of participating in a BitTorrent swarm, the plaintiff can get to work negotiating settlements. An account holder accused of infringement is almost invariably threatened with statutory damages and the prospect of paying the plaintiff's attorney's fees if he is unable to establish his innocence. Reports indicate that settlements are usually in the range of \$2000 to \$4000. That is a lot to pay for a movie, but only a fraction of the potential statutory damages for willful copyright infringement, which can be as high as \$150,000 per work infringed. The \$4000 figure is also evidently "a sum calculated to be just below the cost of a bare-bones defense." This does not prove that the plaintiffs are simply pursuing nuisance-value settlements, but it is consistent with that theory.

¹⁵ Sag, M. (2015). Copyright trolling: An empirical study. *Iowa Law Review*, 100(3): 1105–1147.

Consistent with Sag's (2015) observations, I understand Strike 3 has accepted offers of judgment of \$3,250, inclusive of damages, costs, and attorney fees.

1. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 76.172.87.57* (S.D.Cal.) 3:17-cv-02317-JAH-BLM.
2. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 76.247.176.87* (N.D.Cal.) 5:17-cv-07058-EJD.

In a similar Strike 3 matter, the court concluded, "Strike 3 is a copyright troll," and invoked much of the economic logic discussed above:¹⁶

Little wonder so many defendants settle. Indeed, the copyright troll's success rate comes not from the Copyright Act, but from the law of large numbers. According to PACER, over the past thirteen months, Strike 3 has filed 1849 cases just like this one in courts across the country—forty in this district alone—closely following the copyright trolls who together consumed 58% of the federal copyright docket in 2015. These serial litigants drop cases at the first sign of resistance, preying on low-hanging fruit and staying one step ahead of any coordinated defense. They don't seem to care about whether defendant actually did the infringing, or about developing the law. If a Billy Goat Gruff moves to confront a copyright troll in court, the troll cuts and runs back under its bridge. Perhaps the trolls fear a court disrupting their rinse-wash-and-repeat approach: file a deluge of complaints; ask the court to compel disclosure of the account holders; settle as many claims as possible; abandon the rest. [citations omitted]

Consistent with Judge Lamberth's "Billy Goat Gruff" observation, I understand Strike 3 has dismissed all cases being heard by Judge Zilly. I also understand that in the face of risking \$250 in sanctions for missing deadlines in the Eastern District of California, Strike 3 has terminated 24 cases. This seems to support Judge Lamberth's "cut and run" observation.

¹⁶ *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 73.180.154.14*. Memorandum Opinion. Civil Action #1:18-cv-01425-RCL (D.D.C). November 16, 2018.

1. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 73.2.97.225, 1:18-cv-01075-MCE-CKD*
2. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 24.7.149.73, 1:18-cv-01076-MCE-CKD*
3. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 73.151.0.97, 1:18-cv-01080-MCE-CKD*
4. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 73.220.162.116, 1:18-cv-01089-MCE-CKD*
5. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 73.151.0.180, 1:18-cv-01304-MCE-CKD*
6. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 67.160.250.96, 2:18-cv-02640-MCE-CKD*
7. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 73.70.116.109, 2:18-cv-02641-MCE-CKD*
8. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 73.71.165.41, 2:18-cv-02642-MCE-CKD*
9. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 98.208.93.240, 2:18-cv-02643-MCE-CKD*
10. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 108.245.210.201, 2:18-cv-02584-MCE-CKD*
11. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 162.237.197.54, 2:18-cv-02585-MCE-CKD*
12. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 98.238.245.116, 2:18-cv-02636-MCE-CKD*
13. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 24.10.96.207, 2:18-cv-02638-MCE-CKD*
14. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 71.193.15.139, 2:18-cv-02639-MCE-CKD*
15. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 73.41.142.236, 2:18-cv-02206-MCE-CKD*

16. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 73.41.243.20, 2:18-cv-02207-MCE-CKD*
17. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 73.41.91.169, 2:18-cv-02208-MCE-CKD*
18. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 73.90.99.129, 2:18-cv-02209-MCE-CKD*
19. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 108.197.138.209, 2:18-cv-02582-MCE-CKD*
20. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 24.7.176.79, 2:18-cv-02201-MCE-CKD*
21. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 67.164.218.16, 2:18-cv-02202-MCE-CKD*
22. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 67.169.98.18, 2:18-cv-02203-MCE-CKD*
23. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 73.151.99.229, 2:18-cv-02204-MCE-CKD*
24. *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 73.192.163.54, 2:18-cv-02205-MCE-CKD*

7 Plaintiff's revenues from settling litigation

Plaintiff has not provided financial information for Strike 3 in this matter. Upon provision of such information, I reserve the right to supplement or modify my report to evaluate revenues and/or income Plaintiff receives from pursuing its litigation strategy in BitTorrent matters. The following information would be useful to more comprehensively evaluate Plaintiff's income from pursuing and settling litigation:

1. Information similar to that submitted to the court in *Malibu Media, LLC v. John Doe subscriber assigned IP address 24.148.79.226*, Plaintiff's Status and Informational Report for Its Cases in the Northern District of Illinois, Civil Action No. 1:14-cv-00693 (N.D. Ill. Apr. 6, 2014). The submission provides

information regarding 268 cases filed by Malibu Media and included the following information:

- a. Number of cases filed,
- b. Number of cases with joined defendants and number of cases against a single defendant;
- c. Investigation costs associated with each case including, but not limited to the purchase and investigation of PCAP files;
- d. Status of each of the cases, such as:
 - i. Dismissed—Hardship
 - ii. Dismissed—Insufficient Evidence
 - iii. Dismissed—No Discovery
 - iv. Dismissed—Settled (including settlement amount)
 - v. Judgment Entered (including judgment amount)
 - vi. Litigation
 - vii. Negotiating
 - viii. Pre-Discovery
 - ix. Pre-Litigation
2. Number of monthly and/or annual subscriptions to Strike 3's Blacked, Tushy, and Vixen adult websites; monthly and/or annual subscription revenue; processing charges associated with subscriptions.
3. Number of monthly and/or annual unit sales of and revenues from DVDs sold by Strike 3.
4. Monthly and/or annual expenditures associated with serving DMCA notices.

I understand depositions were taken—and continue to be taken—in this matter. I have not had an opportunity to review the deposition transcripts. Lacking any financial details from Strike 3, and based on Defendant's counsel's observations

from deposition testimony, I estimate the following allocation of revenues, costs, and profits from Plaintiff's litigation strategy to date.

[REDACTED]	[REDACTED]
[REDACTED]	
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

Revenues from settlements, IPP services, and net revenues from settlements are from Defendant's counsel's observations of deposition testimony. Number of complaints are from Lex Machina. *Additional court fees and inside counsel costs* are my estimates.

[REDACTED]

8 Damages

My understanding is that Defendant has filed two counterclaims, one for declaratory relief of non-infringement and another for abuse of process. Further, my understanding is that Washington state law entitles a party claiming abuse of process to claim damages.¹⁷

I understand a part of the damage element is the harm incurred by the individual, including attorney's fees and costs. It is also my understanding that attorney's fees in the Ninth Circuit is determined by "Lodestar."

¹⁷ *Hough v. Stockbridge*. 152 Wash. App. 328 (2009)

At this time, I understand that damages will be incurred as the case proceeds. These damage are likely to take the form of attorney's fees, expert fees, and actual harm to the Defendant separate from attorney's fees and costs.

The harm suffered by Defendant would be legal fees, which are ongoing until termination of this matter. At that time, I am prepared to give an opinion regarding the reasonableness of these fees. AIPLA (2011) reports the median cost of litigating copyright infringement through the end of discovery in the West is \$150,000, with 50 percent of cases in the range of \$100,000 to \$250,000.¹⁸

The U.S. Supreme Court concluded, "a successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright."¹⁹ Economically speaking, an award of attorney's fees that encourages the defense of potential nuisance suits may further the policies of the Copyright Act by discouraging the filing of a suits that plaintiffs and plaintiffs' attorneys know to be nuisance suits.

9 Conclusion

Litigation is not the only way for Plaintiff to stop infringement. If the volume of complaints filed by Strike 3 are an indication of actual infringement, it seems obvious that the filing of lawsuits is not "effective" in deterring infringement.

DMCA notices are one well known and widely used method to discourage infringement. At the time of the downloading activity alleged by Plaintiff, Defendant's Internet service provider, Comcast, indicates it had policies to comply with the DMCA, including, "a policy to terminate the Service, in appropriate circumstances, provided to any customer or user who is a repeat infringer of third party copyright rights."

Plaintiff's actions in this suit, and others, are consistent with a theory that plaintiff is pursuing nuisance value settlements, using the prospect of statutory damages and litigation expenses to extract quick settlements of low-probability-

¹⁸ American Intellectual Property Law Association (2011). *Report of the Economic Survey*.

¹⁹ *Fogerty v. Fantasy*, 510 U.S. 517 (1994).

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of-prevailing claims. Strike 3's strategy in BitTorrent litigation appears to satisfy a three-part test for nuisance value litigation. ■

Respectfully submitted by

A handwritten signature in black ink, appearing to read 'Eric Fruits', written over a horizontal line.

Eric Fruits, Ph.D.

Dated: April 15, 2019

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Dr. Eric Fruits is an economics expert, finance expert, and statistics expert. He has produced numerous research studies involving economic analysis, financial modeling, and statistical analysis. As an expert witness, he has provided expert testimony in state courts, federal courts, and an international court.



As an economic damages expert, Dr. Fruits has provided expert testimony regarding business valuation, lost profits, and foregone income. He has been a testifying expert in cases involving real estate valuation, health care services, and transportation and shipping services. His research on the formation of cartels was published in the top-tier *Journal of Law & Economics*. His study of the impact of natural gas pipeline on residential property values has been published in the *Journal of Real Estate Research*, one of the premier academic journals in the field. He has provided expert testimony to state courts and federal courts.

As a finance expert, Dr. Fruits has been a testifying expert and provided expert consulting services in cases alleging insider trading and market manipulation. He is a securities expert who has conducted numerous research studies on financial issues, including initial public offerings and municipal bonds.

As a statistical expert, Dr. Fruits has provided expert testimony regarding real estate transactions, profit projections, agricultural commodities, and war crimes allegations. His expert testimony has been submitted to state courts, federal courts, and an international court.

He has written peer-reviewed articles on real estate markets, initial public offerings (IPOs), the municipal bond market, and the formation and operation of cartels.

Dr. Fruits has been affiliated with Portland State University, Pacific Northwest College of Art, University of Southern California, Indiana University, and the Claremont Colleges. He has been an economic consultant with Nathan Associates, LECG, ECONorthwest, and Econ One Research.

Present Positions & Affiliations

Economics International Corp. President and Chief Economist	2006–present
Cascade Policy Institute Vice President of Research	2019–present
International Center for Law & Economics Chief Economist	2017–present
Portland State University Adjunct Professor in Economics, Business Administration, and Urban Studies & Planning	2002–present

Previous Professional Experience

Portland State University Oregon Association of Realtors Faculty Fellow <i>Center for Real Estate Quarterly Report</i> , Editor	2010–2019
Nathan Associates Inc. Principal Consultant	2012–2018
Info Tech, Inc. Expert Consultant	2015–2018
Pacific Northwest College of Art Adjunct Professor	2009–2010
ECONorthwest Senior Economist	2002–2008
LECG, LLC Senior Economist	1999–2002
Claremont Graduate University Adjunct Professor of Economics and Visiting Scholar	1996–2002
Econ One Research, Inc. Economist	1998–1999
University of Southern California, Marshall School of Business Visiting Assistant Professor of Finance & Business Economics	1997–1998
Indiana University, Kelley School of Business Visiting Assistant Professor of Business Economics & Public Policy	1997
Scripps College Adjunct Professor of Economics	1996
Pomona College Lecturer in Economics	1994
Andersen Consulting Staff Consultant	1990–1991

Education

Ph.D., Economics, Claremont Graduate University	1997
M.A., Economics, Claremont Graduate University	1993
B.S. with Distinction, Business Economics & Public Policy, Indiana University	1990

Publications, Reports, and Other Papers

Academic Publications

- Perceived environmental risk, media, and residential sales prices. *Journal of Real Estate Research*, with J. Freybote. 37(2):217–243. 2015.
- Compact development and greenhouse gas emissions: A review of recent research. *Center for Real Estate Quarterly Journal*, 5(1):2–7. Winter 2011.
- Test bank for W. B. Brueggeman and J. D. Fisher. *Real Estate Finance and Investments*, 14th ed. McGraw-Hill/Irwin. 2010.
- A comprehensive evaluation of the comparative cost of negotiated and competitive methods of municipal bond issuance. *Municipal Finance Journal*, with R. J. Pozdena, J. Booth, and R. Smith. 28(4):15–41. Winter 2008.
- Market power and cartel formation: Theory and an empirical test. *Journal of Law and Economics*, with D. Filson, E. Keen, and T. Borchering. 44:465–480. 2001.
- The Determinants of Managerial Ownership: Theory and Evidence From Initial Public Offerings*. Claremont Graduate University. 1997.
- Managerial ownership, compensation, and initial public offerings. In Marr, M. and Hirschey, M., editors, *Advances in Financial Economics*, volume 2. JAI Press. 1996.

Research Reports

- Impact of Federal Transfers on State and Local Own-Source Spending*. Interstate Policy Alliance. 2015.
- Impact of Right-to-Work on the State of Washington*. Washington Policy Center. 2015.
- Proposal for Management of the Elliott State Forest to Provide Adequate Returns for Oregon Schools*. Cascade Policy Institute. 2014.
- Tax Myths Debunked*. American Legislative Exchange Council, with R. J. Pozdena. 2013.
- Forecast of Oregon's economy in 2013: Disappointing but not disastrous. *Center for Real Estate Quarterly Journal*, 6(4):4–10. Fall 2012.
- Right-to-Work and Economic Growth: A Comprehensive Analysis of the Economic Benefits to New Mexico of Enacting a Right-to-Work Law*. Rio Grande Foundation. 2012.
- Right-to-Work is Right for Oregon: A Comprehensive Analysis of the Economics Benefits From Enacting a Right-to-Work Law*. Cascade Policy Institute, with R. J. Pozdena. 2012.
- Tax Policy and the Colorado Economy: The Effects on Employment and Migration*. Common Sense Policy Roundtable, with R. J. Pozdena. 2011.
- Fiscal Impacts of an Oregon Tax Credit Scholarship Program*. Cascade Policy Institute. 2011.
- The Oregon Health Plan: A "Bold Experiment" that Failed*. Cascade Policy Institute. 2010.

Tax Policy and the Oregon Economy: The Effects of Measures 66 and 67. Cascade Policy Institute, with R. J. Pozdena. 2009.

Future Management of the Elliott State Forest: Providing Adequate Returns for Oregon's Schools. Cascade Policy Institute. 2009.

Fiscal Impacts of Proposed Educational Tax Credits. Cascade Policy Institute. 2009.

Impact of Minimum Wage Indexing on Employment and Wages: Evidence from Oregon and Washington. Employment Policies Institute. 2009.

The Relationship Between Residential Development and Greenhouse Gas Emissions. National Association of Homebuilders. 2008.

Oregon Greenhouse Gas Reduction Policies: The Economic and Fiscal Impact Challenges. Cascade Policy Institute, with R. J. Pozdena. 2008.

The Ranking of Oregon State and Local Spending. Cascade Policy Institute, with R. J. Pozdena. 2008.

Damages: Experts, liability, and calculations. In *The Employment Case: From Discovery to Decision.* Oregon State Bar CLE Seminars. 2004.

How Does Oregon Spending Rank? Ideas for Budget Stability. Cascade Policy Institute, with R. J. Pozdena. 2004.

Letters, Op-Eds, and Columns

Supplement bus lines with ridesharing. *Portland Tribune*. January 24, 2019.

What ever happened to Pendleton Grain Growers? Pay attention to your co-op. *Oregon Family Farmer*. Fall 2018.

80% of Oregon marijuana exported? *Oregon Family Farmer*. Fall 2018.

Taxing e-cigarettes may do more harm than good. *Oregonian*. November 29, 2018.

Policy reforms would improve state for all. *Portland Tribune*. December 14, 2017. Also published in *Gresham Outlook*.

Health care tax would hurt middle class. *Portland Tribune*. September 21, 2017.

State can balance budget without taxes. *Portland Tribune*. February 23, 2017.

Oregon leaders must reject Medicaid expansion. *Oregonian*. January 27, 2017.

Oregon: State of wonder, or state of failure? *Oregon Business*. May 2016.

How "free" federal money costs North Carolina. *News & Observer*, with B. Balfour. December 15, 2015.

The real cost to states of "free" federal grants. *Orange County Register*. December 10, 2015.

Demand, not fiat, creates jobs. *Wall Street Journal*. June 27, 2015.

Right to work is right for Washington. *Puget Sound Business Journal*, with Erin Shannon. June 26, 2015.

Oregon chemical bill is bad news for businesses. *Oregonian*. April 11, 2015.

Right to work is right for West Virginia. *Charleston Daily Mail*. February 19, 2015.

City's noble goal meets an outlawed tax. *Portland Tribune*. August 8, 2012.

Right to work law can spur economy. *Deming Headlight*. July 10, 2012. Also published in *Tri-City Tribune*.

Rethinking public schools: It's time Portland elects a real education mayor. *Oregonian*. August 9, 2011.

PPS bonds: Save the schools but lose the house? *Oregonian*. January 12, 2011.

Water and sewer charges: Basic services before pet projects. *Oregonian*. May 21, 2010.

PERS disaster will cost taxpayers. *Statesman Journal*. November 8, 2009.

Health care: Congress can learn from the costly mistakes of the states. *Oregonian*. September 1, 2009.

Behind Oregon's jobless rate. *Oregon Business*. February 2009.

The high costs of climate change policies. *Oregonian*. January 24, 2009.

Facing the challenge of a revenue shortfall. *Oregonian*. November 19, 2008.

The youngest boomers trail behind. *Oregon Business*. September 2008.

Slow the growth to cut the carbon. *Oregon Business*. April 2008.

Do we really have a health-care crisis? *Oregon Business*. January 2008.

Economic forecast: Will 2008 bring economic salvation? *Oregon Business Powerbook 2008*. 2007.

The pixie dust of streetcars. *Oregon Business*. October 2007.

Pay me what I'm worth, or else. *Oregon Business*. July 2007.

Easy money. *The Economist*, p. 6. 1994.

Committee and Other Service

Peer reviewer and academic adviser for textbooks and academic journals:

A. O'Sullivan. *Urban Economics*, 9th ed. McGraw-Hill/Irwin. In print.

Taking Sides: Clashing Views in Urban Studies. M. A. Levine, editor. McGraw Hill. 2012.

W. B. Brueggeman and J. D. Fisher. *Real Estate Finance and Investments*, 14th ed. McGraw-Hill/Irwin. 2011.

Municipal Finance Journal

Land Economics

Taxpayer Association of Oregon. Board Member, 2014–present.

City Club of Portland. Research Board Member, 2015–2017.

State of Oregon. Explanatory Statement Committee member. Ballot Title 86: Amends Constitution: Requires creation of fund for Oregonians pursuing post-secondary education, authorizes state indebtedness to finance fund. 2014.

Laurelhurst Neighborhood Association. City of Portland, Oregon. Past President and Board Member, 2014–2015. President, 2009–2014.

City of Portland. Mayor’s Economic Cabinet. 2008–2012.

State of Oregon Department of Environmental Quality. Fiscal Advisory Committee for the Proposed Adoption of Air Quality Improvements at the PGE Boardman Power Plant. 2008.

State of Oregon Department of Environmental Quality. Fiscal Advisory Committee for the Proposed Adoption of the Utility Mercury Rule and Other Federal Air Quality Regulations. 2006.

City of Portland. Mayor’s Ad Hoc Work Group on Regulatory Reform. 2002.

Testimony in Legal Proceedings

Julie Veysey v. Israel Cervante Meraz and Henry Nicholas Veysey. Circuit Court for the State of Oregon for the County of Marion. Case No. 17CV52030. Trial testimony October 3, 2018.

Katrina L. Pinkerton v. Wells Fargo Bank, N.A. United States Bankruptcy Court for the District of Oregon. Case No. 17-33794-tmb13. Adv. Proc. No. 18-03016-tmb. Prove-up hearing testimony June 20, 2018.

Estate of Jamey Charlotte Haines v. State of Oregon Department of Transportation. Circuit Court for the State of Oregon for the County of Washington. Case No. 17CV17952. Trial testimony February 6, 2018.

Rosebank Road Medical Services Ltd. dba Rosebank Road Medical Centre, and Geeta Murali Ganesh v. Ramji Govindarajan and John Does 2–20. Superior Court of California, County of San Francisco, Unlimited Civil. Case No. CGC-16-549755. Deposition testimony September 27, 2017. Trial testimony December 13–14, 2017.

United States of America ex rel. Duke Tran v. Wells Fargo Bank, N.A. United States District Court for the District of Oregon, Portland Division. Case No. 3:15-cv-979. Deposition testimony October 3, 2017.

Nubia Rodriguez v. The State of Oregon, Department of Human Services and Antoinette Hughes. Circuit Court for the State of Oregon for the County of Multnomah. Case No. 16CV09393. Trial testimony September 13, 2017.

Madison-Rae Jordan v. United States of America. United States District Court for the Southern District of California. Case No. 3:15-cv-01199-BEN-NLS. Deposition testimony January 25, 2017.

Marie M. Pearson v. Waste Management of Oregon, Inc. and James Walker. Circuit Court for the State of Oregon for the County of Multnomah. Case No. 15CV18258. Trial testimony August 23, 2016.

Investors Asset Acquisition, et al. v. Angelo S. Scardina, et al. Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida. Case No. 502014CA004618XXXMB AD. Deposition testimony August 5, 2016.

James Busey vs. Richland School District, Richard Jansons, Heather Cleary, Mary Guay, Rick Donahoe, and Phyllis Strickler. United States District Court for the Eastern District of Washington. Case No. CV-12-5022-EFS. Deposition testimony February 25, 2016.

Kivin Varghese v. Amazon.com, Inc. and Amazon Technologies, Inc. Superior Court for the State of Washington in and for the County of King. No. 12-2-39303-6 SEA. Deposition testimony September 22, 2014.

LMG Concerts, LLC v. Salem Communications Corporation, Salem Media of Oregon, Inc., Caron Broadcasting, Inc., Does 1 through 5. U.S. District Court for the District of Oregon. Case No. 3:12-CV-1117. Deposition testimony September 18, 2013.

Claude Hadley v. Extreme Technologies, Inc. Circuit Court for the State of Oregon for Lane County. Case No. 16-11-03225. Trial testimony March 14, 2012.

David Hill Development, LLC, v. City of Forest Grove, Steve A. Wood, and Robert A. Foster. U.S. District Court for the District of Oregon. Civ. No. 08-266-AC. Deposition testimony December 10, 2010. Trial testimony September 20, 2011.

Gordon Ogawa v. Malheur Home Telephone Company dba Malheur Bell and Qwest Corporation. U.S. District Court for the District of Oregon. No. CV 08-694-MO. Trial testimony September 9, 2010.

Dave Molony and Gold Leaf Investments, Inc. v. Crook County. U.S. District Court for the District of Oregon. No. 3:05-CV-1467-MO. Trial testimony May 27, 2009.

Starr-Wood Cardiac Group of Portland, P.C., Dr. H. Storm Floten, and Dr. Anthony Furnary v. Dr. Jeffrey S. Swanson, Dr. Hugh L. Gately, and Cardiothoracic Surgeons LLC. Circuit Court for the State of Oregon for the County of Multnomah, No. 0706-06308. Trial testimony September 5, 2008.

Milutinovic et al. International Criminal Tribunal for the former Yugoslavia, No. IT-05-87 PT. Trial testimony April 23–24, 2008.

In re: The Marriage of Virginia Salvadori and Gabriel Salvadori. State of Washington Clark County Superior Court, No. 06-3-00692-2. Trial testimony April 14, 2008.

Pamela L. Bond, Individually and as Personal Representative of the Estate of Craig R. Bond, Deceased v. United State of America. U.S. District Court for the District of Oregon. No. 06-1652-JO. Trial testimony February 6, 2008.

Erik E. Tolleshaug v. Shaver Transportation Co. Circuit Court for the State of Oregon for the County of Multnomah, No. 060809122. Trial testimony December 14, 2007.

In re: The Marriage of Denise M. Kunze and Gust F. Kunze. State of Washington Clark County Superior Court, No. 05-3-00801-3. Trial testimony October 29, 2007.

Securities and Exchange Commission v. Philip Evans and Paul Evans. U.S. District Court for the District of Oregon. No. CV 05-1162-PK. Deposition testimony February 27, 2007. Trial testimony March 8, 2007.

Randall D. Lam v. Kaiser Foundation Hospitals; Northwest Permanente, P.C.; Kaiser Foundation Health Plan of the Northwest; Robert James Shneidman, M.D.; and David Lee Brown, Jr., P.A. Circuit Court for the State of Oregon for the County of Multnomah. No. 020706633. Trial testimony November 9, 2006.

Vitascan Partners I and Vitascan Partners II v. G.E. Healthcare Financial Services and GE/Imatron. Superior Court for the State of California. No. 01129909. Trial testimony July 24, 2006.

Squaxin Island Tribe, Island Enterprises, Inc., Swinomish Indian Tribal Community, and Swinomish Development Authority v. Fred Stephens, Director, Washington State Department of Licensing. U.S. District Court for Western District of Washington. No. C033951Z. Deposition testimony June 15, 2005.

Androutsakos v. M/V PSARA, PSARA Shipping Corporation, and Chevron U.S.A., Inc. United States District Court for the District of Oregon. No. 02CV1173KI. Trial testimony May 21, 2004.

In re: Consolidated PERS Litigation. Supreme Court for the State of Oregon. Nos. S50593, S50532, S50656, S50657, S50645, S50685, S50687, and S50686. Trial testimony February 27, 2004.

CollegeNET, Inc., v. ApplyYourself, Inc. United States District Court for the District of Oregon. Nos. 02CV484HU and 02CV1359HU. Daubert hearing May 9, 2003.

Grants and Awards

City of Portland Spirit of Portland Award, nominee	2010
City of Portland Livability Volunteer Award	2010
Institute for Humane Studies Research Grant	1996
John Randolph Haynes and Dora Haynes Foundation Grant	1995
Lynde and Harry Bradley Foundation Grant	1992–1995
Lionel Edie Award	1990

Courses Taught

Microeconomics
 Industrial Organization
 Economics of Regulation and Antitrust
 Urban Economics
 Managerial Economics
 Econometrics

Real Estate Finance and Investment

State and Local Public Finance

Economics and the Creative Industries

War Crimes

March 14, 2019